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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

HENRY C. CUTTING,

Appellant,

vs.

HENRY J. WOODWARD, FRANCIS A. WOOD-  
WARD, and THE MONETARY TRUST  
COMPANY, a Corporation,

Appellees.


**Transcript of Record.**

Upon Appeal from the United States District Court for the  
Northern District of California, Second Division.

**Filed**

FEB 15 1916

**F. D. Monckton,**  
**Clerk.**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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**Stipulation [That Third Amended Complaint may  
be Filed].**

It is hereby stipulated and agreed by and between the parties in the above-entitled action, by their respective attorneys, that the plaintiffs may file their **THIRD AMENDED COMPLAINT**, which is attached to this stipulation, without prejudice.

**JNO. B. CLAYBERG,**  
**CLAYBERG & WHITMORE,**  
Attorneys for Plaintiffs.

**WM. H. H. HART,**  
Attorney for Defendants.

Dated December 11th, 1913. [1\*]

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*In the District Court of the United States, in and for  
the Northern District of California, Second  
Division.*

**HENRY J. WOODWARD and FRANCIS A.  
WOODWARD,**  
Plaintiffs,

vs.

**HENRY C. CUTTING and THE MONETARY  
TRUST COMPANY, (a Corporation),**  
Defendants.

**Third Amended Complaint.**

Now come the plaintiffs and by leave of Court first had and obtained file this their third amended bill in equity against the said defendants, and allege as follows:

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\*Page-number appearing at foot of page of original certified Record.

## I.

That plaintiffs, and each of them, now are, and at all the times hereinafter stated were, citizens of the United States and of the State of Illinois, and residents of the State of Illinois; that the defendant, Henry C. Cutting, is now, and at all the times hereinafter stated was, a citizen of the United States and of the State of California, and a resident of the State of California, and of the Northern District of said State; that The Monetary Trust Company is now, and at all the times hereinafter stated was, a corporation organized and existing under and by virtue of the laws of the State of California, and has, and had, at all the times hereinafter stated, its principal place of business in the city and county of San Francisco, within said State of California, and in the Northern District thereof, and that The Monetary Trust Company is now, and at all the times hereinafter stated was, a citizen of the State of California, and a resident of said State of California, and of the Northern [2] District thereof; that the amount of the controversy between the plaintiffs and the defendants herein, and in this action exceeds exclusive of costs and interest, the sum of Two Thousand Dollars (\$2,000). That this action is brought by plaintiffs for and on behalf of themselves and any and all other stockholders of the defendant, The Monetary Trust Company, similarly situated who may join with plaintiffs in this action.

## II.

That this suit is not a collusive one to confer on a court of the United States jurisdiction of a case of



which it did not have cognizance, or otherwise, or at all collusive; that prior to the bringing of this action, and continuously for three (3) months theretofore, plaintiffs requested and demanded of the board of directors, the manager and the other officers of the defendant, The Monetary Trust Company, and of each of them, that proceedings be at once instituted, or an action be at once commenced and prosecuted with diligence in the name and favor of The Monetary Trust Company, to establish the right to relief of said defendant, The Monetary Trust Company, and the plaintiff, as hereinafter alleged, and to procure a decree granting said relief. That the defendant, The Monetary Trust Company, and each and all of its other officers and directors have uniformly and at all times refused to institute any proceedings of any character against said defendant, Henry C. Cutting, for the purpose of establishing the rights of plaintiffs and of said defendant, The Monetary Trust Company, as hereinafter alleged, or to compel said defendant, Henry C. Cutting, to account to said defendant, The Monetary Trust Company, and to these plaintiffs and the other stockholders of said company for the assets and funds of said defendant, The Monetary Trust Company, or to [3] attack the validity of a certain pretended sale by the officers of the said defendant, The Monetary Trust Company, to the defendant, Henry C. Cutting, of eleven hundred and seventy-five (1175) shares of the capital stock of the Point Richmond Canal and Land Company, as hereinafter alleged; that plaintiffs also negotiated with numerous stockholders of said de-

fendant, The Monetary Trust Company, endeavoring to induce such stockholders and each of them to either take proceedings in their own names or to join with plaintiffs in this proceeding and action for the purpose of establishing the rights of the defendant, The Monetary Trust Company, and the plaintiffs herein, and the other stockholders of said defendant company as hereinafter particularly alleged; plaintiffs further allege that because of the fact that a majority of the directors and officers of the defendant, The Monetary Trust Company are now and always have been under the complete control and domination of defendant, Henry C. Cutting, and because the majority of the stockholders of the defendant, The Monetary Trust Company, have also been and now are under the complete control and domination of said defendant, Henry C. Cutting, none of said stockholders or officers of said defendant, The Monetary Trust Company, have taken any steps to bring suit or institute any proceedings to establish the rights of the defendant, The Monetary Trust Company, and of plaintiffs, and the other stockholders of said defendant, The Monetary Trust Company, and to protect said plaintiffs by a proper decree of the Court, and have neglected and refused so to do. Upon information and belief plaintiffs allege that none of the directors or officers of the defendant, The Monetary Trust Company, who are above alleged to be under the control of the defendant, [4] Henry C. Cutting, are the *bona fide* owners and holders of any shares of the capital stock of said company, but that sufficient shares of the stock in said

company to qualify said officers in accordance with the by-laws of the company have been issued to each of them by said defendant, Henry C. Cutting, or through his influence or command, in order that he might control a majority of the board of directors of said defendant, The Monetary Trust Company, and its other officers.

### III.

That Henry J. Woodward, one of the plaintiffs herein, because the equitable owner and holder, for a valuable consideration, of about six hundred (600) shares of the par value of One Hundred Dollars (\$100) each of the capital stock of said defendant, The Monetary Trust Company, on or about the 5th day of January, 1905, and that he is now, and at all the times hereinafter stated has been the *bona fide* equitable owner and holder of said stock for a valuable consideration;

That Francis A. Woodward, one of the plaintiffs herein became the legal owner and holder, for a valuable consideration, of five (5) shares of the par value of One Hundred Dollars (\$100) each, of the capital stock of said defendant, The Monetary Trust Company, on or about the 5th day of January, 1905, and that he is now, and at all the times hereinafter stated has been the *bona fide* and legal owner and holder of said stock for a valuable consideration; that the plaintiffs herein were, and each of them was a *bona fide* owner of said stock in the defendant corporation, The Monetary Trust Company, at the time of each and all of the transactions hereinafter complained of.



That The Monetary Trust Company was the owner and [5] holder of eleven hundred and seventy-five (1175) shares of the par value of One Hundred Dollars (\$100) each of the capital stock of the Point Richmond Canal and Land Company, on and before the 20th day of December, 1906; that said defendant, The Monetary Trust Company, ever since has been and now is the *bona fide* owner and holder thereof, and has a full, free and clear title thereto, except as such title is clouded by the acts of the defendants as hereinafter alleged.

#### IV.

That some time prior to June 11th, 1904 defendant Henry C. Cutting, became the possessor of certain of the capital stock of the defendant, The Monetary Trust Company; that the said stock was issued and stands on the books of the company in the name of said Henry C. Cutting, but these plaintiffs allege upon their information and belief that said defendant, Henry C. Cutting, did not pay the par, actual or market value of said stock in cash or turn over and transfer to said defendant, The Monetary Trust Company, any property, or rights, or perform any services equal in value to the said stock;

Plaintiffs further allege upon their information and belief that the defendant, Henry C. Cutting, acquired said stock without the payment of any sufficient cash consideration therefor, or turning over and transferring to said company property or rights, or performing services for said company as a sufficient payment for, or upon said capital stock; that the number of shares of stock now standing upon the

books of said company in the name of defendant, Henry C. Cutting, as these plaintiffs are informed and believe, are seven hundred and fifty-three (753) shares of stock.

These plaintiffs are informed and believe and therefore [6] allege that said defendant, Henry C. Cutting, promised and agreed with the defendant, The Monetary Trust Company, and its officers in that behalf duly authorized, at or before the time any of said stock was issued to him that he would pay into the treasury of the defendant, The Monetary Trust Company, Ten Dollars (\$10) per share for five hundred (500) shares of said stock, and would also finance said company and place it in such condition that it could safely proceed with its business in a proper method and manner. That said Henry C. Cutting has failed to comply with, or perform his said agreement; that he has only paid into the treasury of the company a few hundred dollars, as near as these plaintiffs are able to ascertain.

V.

Plaintiffs further allege that the assumed records of the defendant, The Monetary Trust Company, of a directors meeting claimed to have been held on or about the 20th day of December, 1906, contain a statement that the following resolution was unanimously passed by the board of directors, viz.: "Mr. H. W. Wernse presented the check of H. C. Cutting for \$1175.00 stating that Mr. Cutting desired to exercise his rights under the option given him by The Monetary Trust Company ratified and confirmed by the stockholders at their last meeting to purchase

1175 shares of the Point Richmond Canal and Land Company stock, held by The Monetary Trust Company, at \$1.00 per share." These plaintiffs allege that according to the by-laws of said company the meeting held on the 20th day of December, 1906, was not a regular meeting of the board of directors of the defendant, The Monetary Trust Company; that such meeting was not properly called in accordance with the by-laws, and the Statutes of the [7] State of California; that the record of said meeting discloses that there were present at said meeting only directors, Henry C. Cutting, one of the defendants herein, W. J. Morgan, and H. W. Wernse, and that directors, Albert Betz and H. B. Mayo were absent. That in accordance with the said by-laws three (3) directors are required to be present to constitute a quorum for the transaction of any business; that as shown and disclosed by said assumed record of said meeting, the above-recited resolution was passed unanimously, and was voted for by directors, W. J. Morgan, H. W. Wernse and the defendant, Henry C. Cutting; that said Henry C. Cutting participated in the vote passing said resolution, and voted for the passage of same; that under and by virtue of said resolution above quoted, the said defendant, Henry C. Cutting, claims that he became a *bona fide* owner and holder for a valuable consideration of the 1175 shares of the capital stock of the Point Richmond Canal and Land Company; that the said defendant, Henry C. Cutting's vote was necessary to the passage of said resolution and that said defendant, Henry C. Cutting, was a disqualified director and was not



allowed to vote thereon. That the said 1175 shares of the capital stock of the Point Richmond Canal and Land Company was on the 20th day of December, 1906, and for a long time prior thereto had, and now is, and ever since has been of great value, to wit, of at least the par value of One Hundred Dollars (\$100) per share; that said stock on said 20th day of December, 1906, and for a long time prior thereto was, and had been as plaintiffs are informed and believe, practically the only asset of the defendant, The Monetary Trust Company, of any appreciable monetary value.

Upon their information and belief plaintiffs further allege that said resolution was not properly or legally passed [8] by said board of directors of the defendant, The Monetary Trust Company, was insufficient to transfer and gave no authority to transfer to said defendant, Henry C. Cutting, said 1175 shares of stock in the Point Richmond Canal and Land Company, or any part thereof.

Plaintiffs further allege upon like information and belief that the check of Henry C. Cutting mentioned in the above-quoted resolution was never cashed by the defendant, The Monetary Trust Company, or by any of its officers, or anyone acting in its behalf, but that the same was returned to said Henry C. Cutting, who then and there pretended to borrow the same amount from the defendant, The Monetary Trust Company, and gave his note to the defendant, The Monetary Trust Company, for the same amount as was specified in said check, which note is still outstanding, and wholly unpaid.

Plaintiffs further allege that it is recited in the resolution above quoted, that the defendant, Henry C. Cutting, decided to exercise his right under the option given him to purchase 1175 shares of the stock in the Point Richmond Canal and Land Company, while plaintiffs allege on information and belief that in truth and in fact, no option of any kind had at that time, or has since that time or at all, been given to the said defendant, Henry C. Cutting, or any other person or persons to purchase said stock from the defendant, The Monetary Trust Company.

Plaintiffs further allege that by the resolution above quoted said option was "ratified and confirmed by the stockholders at their last meeting," while in truth and in fact no stockholders' meeting was held at or about that time, or for a [9] long time prior to said 20th day of December, 1906. That there are no minutes in the books of the defendant, The Monetary Trust Company, of any meeting of the stockholders of said company at or about, or before the 20th day of December, 1906, and that there is no record in any of the minutes of any of the meetings of the stockholders of the defendant, The Monetary Trust Company, in any way referring to the granting, confirming or ratifying any option for the purchase of eleven hundred and seventy-five (1175) shares of stock in the Point Richmond Canal and Land Company or any part thereof, or any mention of any ratification or confirmation of any option given by the said defendant, The Monetary Trust Company, or anyone in its behalf.

Plaintiffs further allege upon their information

and belief that said resolution above quoted set forth other matters and facts which did not exist, and was passed for the fraudulent purpose of allowing the defendant, Henry C. Cutting, to ostensibly acquire the right and title of the defendant, The Monetary Trust Company, in and to eleven hundred and seventy-five (1175) shares of the capital stock of the Point Richmond Canal and Land Company, when in truth and in fact, no sale of said stock had ever been legally authorized or made, and that defendant, Henry C. Cutting, had never paid anything upon the purchase price thereof, but that the entire transaction was fraudulently had by the defendant, Henry C. Cutting, and the directors of the Monetary Trust Company, who were then and ever since have been completely under his control and domination for the purpose of cheating and defrauding plaintiffs, The Monetary Trust Company, and the other stockholders of said company out of all interest in said stock,

Plaintiffs further allege that for many years last [10] past The Monetary Trust Company has not been engaged in the carrying on of any regular business, and has not required the services of any salaried officers in its employment; but, as plaintiffs are informed and believe, and therefore allege, said defendant, Henry C. Cutting, in the operation and carrying on of his own private business, has ostensibly caused his private stenographer and secretary employed by him in his private business to be employed by said defendant, The Monetary Trust Company, on salaries, which said defendant, Henry

C. Cutting, has fraudulently caused to be paid out of the asset of The Monetary Trust Company; that the business of said defendant, The Monetary Trust Company, has not for many years past required any office, but that as plaintiffs are informed and verily believe and therefore allege, defendant, Henry C. Cutting, has caused to be paid out of the assets of the said Monetary Trust Company large sums for rent of offices which he, the said defendant, Henry C. Cutting, has used exclusively in his own behalf, and for his own private business.

## VI.

That since the said defendant, The Monetary Trust Company, has ceased to transact any business, and since the defendant, Henry C. Cutting, procured a majority of the directors of said company to be elected who are and have been completely controlled and dominated by said defendant, Henry C. Cutting, the said defendant, Henry C. Cutting, and said directors, as plaintiffs are informed and verily believe, and therefore allege, have purchased a large amount of office furniture, made elaborate and expensive changes in the interior of said offices, and purchased many hundred dollars' worth of office supplies, all of which, as plaintiffs believe were for the sole use and benefit [11] of said defendant, Henry C. Cutting, and some of the officers and directors of the Monetary Trust Company, *who* are and always were controlled and dominated by him, and not used by or for the defendant, the Monetary Trust Company, or in its business. On information and belief, plaintiffs further allege that said defendant, Henry



C. Cutting, and the directors controlled and dominated by him have uniformly and at all times caused payment for all such furniture, fixtures, changes and supplies to be made out of the moneys and assets of the defendant, the Monetary Trust Company, amounting to a large sum of money, the exact amount of which cannot be ascertained by these plaintiffs from an examination of the books and records of the said Monetary Trust Company; and plaintiffs have no information otherwise, but verily believe and therefore allege that the money so unlawfully misapplied and misappropriated by said Henry C. Cutting exceeds the sum of Five Thousand Dollars (\$5,000).

## VII.

Plaintiffs further allege that by the official financial statement of the defendant, the Monetary Trust Company, bearing date May 14th, 1913, the following are all of the pretended assets of the Monetary Trust Company, viz:

100,000 Shares of Eldorado Gold Basin Dredging Company Stock	Value	—————
.....		
Note, H. C. Cutting, 8% .....	\$1093.00	
Interest on same to 4/27/13 .....	307.51	
Note, H. C. Cutting, 8% .....	1000.00	
Interest on same to 4/27/13 .....	183.67	
Note, W. H. H. Hart .....	1000.00	
Interest on same secured by 100,000 Shares of Eldorado Gold Basin Dredging Company Stock .....		—————
		\$2587.18

## LIABILITIES:

Held in trust for Pacific Under-	
writing and Trust Company....	\$1093.00
Interest on same to 4/20/13.... $\frac{1}{2}$	307.51
	<hr/>
	\$1400.51
Nominal surplus .....	\$1186.67

Plaintiffs allege that there is nothing contained in said official financial statement which in any way or manner discloses the date of any of the respective notes mentioned therein, or the consideration therefor; that there is nothing contained therein which shows or discloses how or why the defendant, the Monetary Trust Company holds Ten Hundred and Ninety-three Dollars (\$1,093), and Three Hundred Seven and  $\frac{51}{100}$  Dollars (\$307.51) interest, in trust for the Pacific Underwriting and Trust Company, nor whether same is, or has been held as notes, obligations or cash, or why or how, or for what purpose any trust was ever created, or that any trust now exists or has ever existed, and that plaintiffs are without any information in relation thereto.

These plaintiffs further allege that in said financial statement above quoted it is set forth that the note of W. H. H. Hart is secured for 100,000 shares of the capital stock of the Eldorado Gold Basin Dredging Company, but that said financial report fails to disclose that said note of W. H. H. Hart is also secured by 300 shares of the capital stock of the Monetary Trust Company; that at the time said note was given said W. H. H. Hart pledged and delivered to said Monetary Trust Company three hun-

dred (300) shares of the capital stock of said company as security for the payment of said note and the interest thereon, and that said three hundred shares so pledged should have been shown upon [13] said financial report as having been pledged as security for the payment of said note; that said three hundred (300) shares of stock so pledged by said W. H. H. Hart is a further asset of said Monetary Trust Company.

Plaintiffs further allege that the said defendant the Monetary Trust Company, has received since its organization large sums of money from the sale of its capital stock, and other sources, the exact amount of which plaintiffs cannot state accurately, and they have been unable to ascertain such amount from the books of said company, but they verily believe and therefore allege that such sums, in the aggregate, amount to over Fifteen Thousand Dollars (\$15,000).

Plaintiffs further allege upon their information and belief that all the legitimate expenses and outlays of said Monetary Trust Company during the time it was doing business, determined from a very liberal estimate would not exceed the sum of Three Thousand Dollars (\$3,000). Plaintiffs allege that said defendant, Henry C. Cutting, has fraudulently misapplied, misappropriated and dissipated all the assets of said company.

#### VIII.

Plaintiffs further allege that shortly after the defendant, Henry C. Cutting, had agreed to purchase five hundred (500) shares of stock of the defendant, the Monetary Trust Company, at and for Ten Dol-

lars (\$10) per share, said company undertook the organization and promotion of the Point Richmond Canal and Land Company; that said Monetary Trust Company paid all of the expenses of the organization of said Point Richmond Canal and Land Company; that the said Monetary Trust Company became the owner of an option or contract to purchase four hundred acres of land in Point Richmond known as the South Marsh [14] situated in Contra Costa County, State of California, for Three Hundred and Thirty-six Thousand Dollars (\$336,000) out of Four Hundred Thousand Dollars (\$400,000) worth of bonds secured on said real estate to be purchased. That the defendant, the Monetary Trust Company, obtained said option or contract from Harry B. Mayo, and — Reichart; that there was an agreement and understanding between the Monetary Trust Company, and said Mayo and said Reichart that all of the capital stock of the Point Richmond Canal and Land Company should be issued as follows:

One-fourth ( $\frac{1}{4}$ ) to Reichart; One-fourth ( $\frac{1}{4}$ ) to Mayo, and one-half ( $\frac{1}{2}$ ) to the Monetary Trust Company:

That said corporation should be capitalized at five thousand shares (5,000) of the par value of One Hundred Dollars (\$100) per share; that the defendant the Monetary Trust Company should own and have one-half ( $\frac{1}{2}$ ) of the Sixty-four Thousand Dollars (\$64,000) worth of the bonds of said company out of the Four Hundred Thousand Dollars (\$400,000) worth of the bonds so to be issued; that said \$400,000 worth of bonds were duly issued by and at



the sole expense of the Monetary Trust Company, and Three Hundred and Thirty-six Thousand Dollars (\$336,000) thereof were delivered to the owner of said land in payment of the purchase price thereof; and the remaining Sixty-four Thousand Dollars (\$64,000) worth of said bonds were owned by said Point Richmond Canal and Land Company and were intended to be used by it in the development and sale of said property.

That the said Point Richmond Canal and Land Company became the owner of the legal title in fee simple of all of said land subject only to the \$400,000 bonds which had been issued in payment of said property; that subsequently to the issuance of said bonds The Monetary Trust Company turned over and delivered [15] one hundred and fifty (150) shares of said stock in the Point Richmond Canal and Land Company to A. N. Lewis, leaving said Monetary Trust Company, the owner of twenty-three hundred and fifty (2350) shares of said stock of said Point Richmond Canal and Land Company. That immediately after said transaction the defendant, Henry C. Cutting, proposed to The Monetary Trust Company that he would finance the Point Richmond Canal and Land Company and furnish all the funds necessary to develop and sell said land, provided he could obtain control of the stock of said company; that he would buy Ten Thousand Dollars (\$10,000) worth of the bonds and when that amount of money was spent, he would raise whatever further amount of money might be necessary; that the Monetary Trust Company accepted said proposition and delivered

to said defendant, Henry C. Cutting, one-half of the twenty-three hundred and fifty (2350) shares of the Point Richmond Canal and Land Company then owned by it, and said Henry C. Cutting procured from other sources sufficient stock to give to said defendant, Henry C. Cutting, a majority of all of the capital stock of the Point Richmond Canal and Land Company then issued and thus give him full control of said company. That said defendant, Henry C. Cutting, paid absolutely nothing for said stock and utterly failed to carry out his agreement to buy Ten Thousand Dollars (\$10,000) worth of said bonds and to finance said Point Richmond Canal and Land Company.

#### IX.

Plaintiffs further allege upon information and belief that all and singular the acts and doings of the defendant, Henry C. Cutting, as hereinbefore alleged, were fraudulent and intended so to be, and were done and committed by the said defendant, Henry C. Cutting, for the express purpose of cheating and [16] defrauding The Monetary Trust Company out of all its assets, property, rights and business, and of defrauding and cheating these plaintiffs and all the other stockholders out of their rights in and to any value in the assets of said defendant, The Monetary Trust Company; that said defendants, Henry C. Cutting, purposely, intentionally and fraudulently concealed his fraudulent practices in the performance of said acts and doings, from plaintiffs and the other stockholders by causing to be kept insufficient and inaccurate books of account and corporate records of the

affairs of said company, and lulled plaintiffs and the other stockholders into seeming security by statements made by him that all the stockholders of the defendant, The Monetary Trust Company, should be jointly interested with him, said Henry C. Cutting, in all profits which might grow out of any of his transactions with or pertaining to the business, property and affairs of the defendant, The Monetary Trust Company, and that he, the said Henry C. Cutting, should and would hold the title of eleven hundred and seventy-five (1175) shares of the stock in the Point Richmond Canal and Land Company in trust for the said defendant, The Monetary Trust Company.

Plaintiffs further allege that by said acts of said defendant, Henry C. Cutting, as hereinbefore alleged, in so far as the same or any of them were known to plaintiffs, or either of them, they and each of them were made to believe and did believe that the acts of said Henry C. Cutting, as hereinbefore alleged, were for the best interests of the defendant, The Monetary Trust Company, and all of its stockholders, and that said defendant, Henry C. Cutting, was honest in the performance of all such acts; that acting under such belief these plaintiffs and neither of them made any careful investigation of the book [17] accounts, records and transactions of the said defendant, The Monetary Trust Company, or of the acts and doings of said defendant, Henry C. Cutting; all this in full belief that said Henry C. Cutting was acting honestly and for the best interests of The Monetary Trust Company, and all of its stockholders;

These plaintiffs further allege that they subsequently discovered that said defendant, Henry C. Cutting, had been acting dishonestly and fraudulently with reference to the business affairs of the defendant, The Monetary Trust Company, with its assets and property and with the stockholders of said company and that they did not discover said fraud and fraudulent practices until on or about the month of January, 1913, and immediately after ascertaining the facts that the conduct of said Henry C. Cutting, as hereinbefore alleged, was fraudulent and intended for the purpose of defrauding plaintiffs, The Monetary Trust Company, and the other stockholders of said company out of all the property and assets of said company and the value of said stock, they instituted this suit for the purpose of submitting the entire matter to the court and protecting the value of their stock and requiring said defendant, Henry C. Cutting, to account for all moneys or property of the defendant, The Monetary Trust Company, which may have come into his hands since its incorporation, and to replace in the treasury of said company all the moneys, stocks or other securities for the benefit of the stockholders of said company, or recover judgment and decree against said defendant, Henry C. Cutting, requiring him to answer for same.

#### X.

Plaintiffs further allege that said defendant, Henry C. Cutting, was the president, and a director of The Monetary [18] Trust Company and at all times herein mentioned acted in a fiduciary capacity



for and towards plaintiffs and each and every stockholder of said company with reference to the assets, property and business of said company; and that it was his duty while acting in such fiduciary capacity not to deal in, or with any of said assets, property or business for individual benefit, but to conserve and care for such assets, property and business for the benefit and protection of said company and of all its stockholders; that the said defendant, Henry C. Cutting, has openly violated such duties and has misapplied, misappropriated and converted all the assets, property and business of said company to his own individual use and benefit, as hereinbefore alleged.

Plaintiffs allege that large amounts of money belonging to The Monetary Trust Company, the exact amount of which is unknown to plaintiffs, have come into the possession of the defendant, Henry C. Cutting, and that said Henry C. Cutting has misapplied, misappropriated and converted the same to his own use. Plaintiffs further allege that they have no plain, speedy or adequate remedy at law and therefore bring this their bill of complaint in a court of equity where all matters of accounting and fraud are fully cognizable.

WHEREFORE, these plaintiffs pray,—

1. That the defendant, Henry C. Cutting, be required to render under the orders and directions of this Court a full and accurate account of all the moneys, assets and property belonging to the defendant, The Monetary Trust Company, and to pay over to the treasurer of said company all sums found due

by this Court from the said defendant, Henry C. Cutting, on said accounting.

2. That this Court find and decree that the attempted fraudulent transaction of the defendant, Henry C. Cutting, whereby [19] he claims the title to twenty-three hundred and fifty (2350) shares of the capital stock of the Point Richmond Canal and Land Company, and each and all of said shares, be held void and ineffectual, and that said defendant, Henry C. Cutting, be required to surrender each and all of said twenty-three hundred and fifty (2350) shares and cause the same and the whole thereof to be reissued in the name of the defendant, The Mone-  
tary Trust Company.

3. That plaintiffs may have such other and further relief as to this Court may seem meet.

4. That plaintiffs recover their costs of suit in this behalf most unlawfully sustained.

JNO. B. CLAYBERG,

CLAYBERG & WHITMORE,

Solicitors and Counsel for Plaintiffs.

[Endorsed]: Filed Dec. 11, 1913. [20]

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At a stated term, to wit, the November term, A. D. 1913, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday, the 15th day of December, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

**Order Dismissing Suit as to Certain Defendants.**

Upon motion of Hobart L. Clayberg, Esq., attorney for plaintiffs, it was ordered that this suit be and the same is hereby dismissed as to said defendants said Point Richmond Canal and Land Company, a corporation, H. W. Wernse, Albert Betz, W. J. Morgan and H. B. Mayo. [22]

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**Notice of Motion to Dismiss and Strike from the  
Files Plaintiffs' Third Amended Bill in Equity  
in the Above-entitled Suit.**

To Messrs. John B. Clayberg, and Clayberg & Whitmore, Solicitors for Plaintiffs:

Please take notice that on Monday, the 16th day of February, 1914, at the opening of court on said day, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, at the courtroom of said court, Division No. 2, in the United States Postoffice Building in the city and county of San Francisco, State of California, a motion will be made to dismiss and strike from the files plaintiffs' third amended bill in equity, a copy of which motion is hereto annexed and served herewith.

San Francisco, California, February 9th, 1914.

WM. H. H. HART,  
Solicitor for Certain Defendants. [23]

**Motion of the Defendants, Monetary Trust Company and H. C. Cutting to Dismiss and Strike from the Files Plaintiffs' Third Amended Bill in Equity in the Above-entitled Suit.**

The motion of the defendants, Monetary Trust Company, and H. C. Cutting, to dismiss said suit for want of jurisdiction, and to dismiss and strike from the files the plaintiffs' third amended bill in equity on file in the above-entitled action.

These defendants, and each of them, in their corporate and in their individual capacities, as aforesaid, by protestation, not confessing or acknowledging all or any of the matters and things in the plaintiffs' third amended bill of complaint in equity therein contained to be true, in such manner and form, and in such manner or form, as the same are therein set forth and alleged, do jointly and severally move to dismiss and strike from the files said third amended bill in equity on file in the above-entitled suit, and for cause of said motion and as grounds thereof, said defendants, and each of them, specify the following:—

First. To dismiss said suit in equity for want of jurisdiction.

1st. In that it appears that this Court has not jurisdiction either at law or in equity of said plaintiffs' said third amended bill in equity, in that it fully appears therefrom that said [24] corporation was created and existing under the laws of the State of California and has its principal place of business in said State; that H. C. Cutting, the other defendant



to said bill, is a citizen of the State of California; that the plaintiffs are not entitled to maintain said action in this court for the reason that said suit is for and in behalf of a corporation which is a citizen and resident of the State of California, and in that said suit must be prosecuted in favor of said corporation, a citizen of this State, and that it is not a personal suit in favor of said plaintiffs, and the amount involved is but \$2,000.

2d. In that it fully appears from said third amended bill in equity that the matter tendered for adjudication is wholly a controversy at all times existing between said Monetary Trust Company, a corporation, a citizen of California, and said H. C. Cutting also at all times a citizen of the State of California, and that the suit being for the benefit solely and only of said corporation, is cognizable in the State Court and not in the District Court of the United States, and the amount involved is but \$2,000.

Second. Said suit should be dismissed and said third amended bill stricken from the files:—

In that the plaintiffs have not, in and by their said third amended bill in equity, made or stated such a case as does or ought to entitle them, or either of them, to any such discovery or relief as is by them sought and prayed for from or against these defendants, or either of them.

Third. Said suit should be dismissed and said third amended bill stricken from the files:—

In that it appears by said third amended bill that the [25] same is exhibited by the plaintiffs against these defendants, and each of them, for sev-

eral distinct matters and causes, in many whereof, as appears by said third amended bill in equity, and that said third amended bill in equity is altogether multifarious, and, by reason of joining distinct matters and causes of suit together, the proceedings in the progress of said suit will be intricate and prolix, and no distinct cause of suit is separately stated, and that by reason thereof these defendants, and each of them, both individually and as aforesaid, would be put to unnecessary charges and expenses in matters which would cause the mixing of the several matters complained of, and in that behalf said defendants, and each of them, specify the following:—

(a) In that it is attempted to set forth an alleged equitable cause of action in favor of the defendant, Monetary Trust Company, for the annulling of the sale of certain shares of the capital stock of the Point Richmond Canal and Land Company theretofore claimed by plaintiffs to have been the property of said Monetary Trust Company, without asking for an accounting or any other relief in favor of said Monetary Trust Company, and failing wholly and fully to state a cause of action in equity for setting aside and nullifying said alleged sale of said capital stock, which transaction is complained of and attempted to be mixed with another and different attempted alleged cause of equitable action for an accounting of the business affairs of the Point Richmond Canal and Land Company, in which corporation it is not claimed or alleged that the plaintiffs have or ever had any stock or shares.

(b) In that it is also attempted to set forth and allege an equitable cause of action against the Point Richmond Canal and Land Company, and asking for an accounting against said defendants [26] for and on account of said Point Richmond Canal and Land Company without it being made a party defendant, and without it being first shown and positively alleged that said plaintiffs have any interest in, or right to, an accounting with or of said Point Richmond Canal and Land Company, and in that said third amended bill in equity, does not state facts sufficient to constitute a cause of action in equity or otherwise, against said Point Richmond Canal and Land Company.

(c) In that it is attempted to set forth in said third amended bill in equity two claimed alleged causes of action against the defendant, H. C. Cutting, one on account of The Monetary Trust Company, in which said Point Richmond Canal and Land Company is not interested, and a second alleged cause of action in favor of the Point Richmond Canal and Land Company, in which said Monetary Trust Company is not interested, and which alleged cause of action against the said Point Richmond Canal and Land Company, without it being made a party hereto, cannot be maintained until it is first proven and a decree of court entered showing that said Monetary Trust is or was a stockholder of said Point Richmond Canal and Land Company; therefore, these defendants, and each of them, claim that said third amended bill in equity is multifarious.

Fourth. Said suit should be dismissed and said third amended bill in equity stricken from the files:

In that it fully appears that said plaintiffs are guilty of laches in that it appears that the act complained of in selling the capital stock of the Point Richmond Canal and Land Company occurred in October, 1906, and in that no suit had been brought in the meantime to set aside said sale, and in that it appears that said first amended bill in equity in this suit was [27] not filed until the 19th day of February, 1913, and that by reason thereof, said defendants allege that plaintiffs' causes of action are barred.

Fifth. In that plaintiffs' alleged causes of action are barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure of the State of California.

Sixth. In that plaintiffs' alleged causes of action are barred by the provisions of section 343 of the Code of Civil Procedure of the State of California.

Seventh. In that plaintiffs' alleged causes of action are barred by the provisions of section 359 of the Code of Civil Procedure of the State of California.

That upon the hearing of this motion said defendants will refer to and read this motion, plaintiffs' said third amended bill in equity, the notice of the hearing of this said motion, and the records in said cause.

WHEREFORE, these defendants jointly and severally pray the Court:

1. To dismiss said suit for want of jurisdiction in



said court to hear and determine the matters therein attempted to be litigated.

2. That the Court dismiss said suit for want of equity.

3. That the Court dismiss said suit and strike said third amended bill in equity from the files of said court for the reasons and upon the grounds hereinbefore set forth.

San Francisco, California, February 9th, 1914.

WM. H. H. HART,

Solicitor for Certain Defendants. [28]

Service of a copy of the within notice of motion and motion, etc., is hereby admitted this 10th day of February, 1914.

CLAYBERG & WHITMORE,

Solicitors for Plaintiffs. [29]

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**Amendment to Third Amended Complaint.**

Comes now the plaintiffs in the above-entitled action and file this their amendment to the third amended complaint, as follows:

Amend line 9, on page 2, of said third amended complaint, so that same shall read as follows:

“Of costs and interest the sum of Three Thousand Dollars (\$3,000).”

Dated this 16th day of February, 1914.

CLAYBERG & WHITMORE,

Attorneys for Plaintiffs. [30]

**Stipulation [that Amendment to Third Amended Complaint may be Filed, etc.].**

It is hereby stipulated that plaintiffs may file the annexed amendment to their third amended complaint, and the verification of such amendment is hereby expressly waived.

Dated the 16th day of February, 1914.

CLAYBERG & WHITMORE,

Attorneys for Plaintiffs.

WM. H. H. HART,

Solicitor for Defendants.

Due service and receipt of a copy of the within Amendment to Bill is hereby admitted this 17th day of February, 1914.

WM. H. H. HART,

Solicitor for Defendants. [31]

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At a stated term, to wit, the March term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday, the 30th day of March, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

**Order Denying Defendants' Motion to Dismiss, etc.**

Defendants' motion to dismiss and to strike from the files, the third amended bill of complaint, as amended; heretofore heard and submitted, being now

fully considered and the Court having rendered its oral opinion thereon; it was ordered that said motion be and the same is hereby denied. [32]

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### **Answer to Third Amended Bill of Complaint.**

The joint and several answer of the Monetary Trust Company, a corporation, and Henry C. Cutting, defendants, to the third amended bill of complaint of the above-named plaintiffs, Henry J. Woodward and Francis A. Woodward, complainants:

These defendants, and each of them, now and at all times hereinafter saving and reserving to themselves, and each of them, all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said third amended bill of complaint contained, for answer thereunto, or to so much or such parts thereof as these defendants are, and each of them is advised is material for them, and each of them, to make answer unto, they and each of them, answer and say:

First. Answering paragraph 1 of said third amended bill of complaint these defendants, and each of them, admit that said complainants, and each of them, were at all times mentioned in said third amended bill of complaint citizens of the United States and of the State of Illinois and residents of said State of Illinois.

These defendants, and each of them, further answering said paragraph 1 say that they, and each of them, admit that the [33] said Henry C. Cutting, is now, and was at all the times stated in said third

amended bill of complaint, a citizen of the United States and of the State of California and a resident of said State of California and of the Northern District of said State, and that the Monetary Trust Company, at all times mentioned in said third amended bill of complaint was and is now a corporation organized and existing under and by virtue of the laws of the State of California and has, and had, at all times its principal place of business in the city and county of San Francisco within said State of California, and within the Northern District thereof; that the said defendant, Monetary Trust Company, is now and was at all times stated in said third amended bill of complaint a citizen of said State of California, and a resident of said State and of said Northern District thereof.

These defendants, and each of them, further answering said paragraph 1, say that they deny that the amount of the controversy between the plaintiffs and the defendants herein and in this action, exceeds, exclusive of costs and interest, the sum of Two Thousand Dollars (\$2,000).

These defendants, and each of them, further answering said Paragraph of said third amended bill of complaint, deny that this action is or was brought by the plaintiffs for or on behalf of themselves, and any, or any, and all, or all other stockholders of the defendant, Monetary Trust Company, similarly or otherwise, situated, whom may or might join with said plaintiffs in said action.

Second. In answer to paragraph II of plaintiffs' said third amended bill of complaint, these defend-



ants deny, and each of them denies, that this suit is not a collusive one [34] to confer on a court of the United States jurisdiction of a case of which it did not have cognizance, or otherwise, or at all, not collusive.

In further answer to said paragraph II these defendants deny, and each of them denies, that prior to the bringing of this action, or continuously for three (3) months theretofore, or otherwise, or at all, plaintiffs, or either of the, requested or demanded of the board of directors, or the manager, or the other officers, or any officer of the defendant, Monetary Trust Company, or of each or any of them, that proceedings be at once, or otherwise, or at all, instituted, or that an action be at once, or otherwise, or at all commenced or prosecuted with, or without, diligence in the name of or in favor of The Monetary Trust Company to establish the right, or any right, to relief of said defendant, The Monetary Trust Company, or that the plaintiffs as in said third amended bill of complaint alleged, or otherwise, sought, or are seeking, to procure a decree granting said or any relief.

Said defendants, and each of them, further answering said paragraph II deny that the defendant, Monetary Trust Company, or each, or all, or any of its officers or directors, have uniformly, or at all times, or at any time, refused to institute any proceedings of any character against said defendant, Henry C. Cutting, for the purpose of establishing the rights of plaintiffs, or either of them, or of said defendant, Monetary Trust Company, to compel said de-

fendant, Henry C. Cutting, to account to said defendant, Monetary Trust Company, or to said plaintiffs, or either of them, or to the stockholders of said company, or any of them, for the assets or funds of said defendant, Monetary Trust Company, or to attack the validity of a certain pretended [35] sale, or any sale, by the officers, or any officer of said defendant, Monetary Trust Company, to the said Henry C. Cutting, of eleven hundred and seventy-five (1175) shares, or any other number of shares, or any shares, or share of the capital stock of the Point Richmond Canal and Land Company, as in said third amended bill of complaint alleged.

Said defendants, and each of them, further answering said paragraph II say that they know not, and each of them knows not, and that they have not, and each of them has not been informed, save by said complainants' third amended bill, and cannot set forth as to their, or his, or its belief, or otherwise, whether said plaintiffs also, or at all, negotiated with numerous stockholders, or any stockholder of said defendant, Monetary Trust Company, endeavoring to induce such stockholders, or each, or any of them, to either take proceedings in their own names, or to join with plaintiffs in this proceeding and action, or otherwise, for the purpose of establishing the rights of the defendant, Monetary Trust Company, and the plaintiffs herein, and the other stockholders of said defendant company, as in said third amended bill of complaint alleged, and therefore, said defendants, and each of them, deny said statements generally and specifically.

These defendants further answering said paragraph II deny that a majority of the directors or officers of defendant, Monetary Trust Company, are now, or always have been, or ever were under the complete control, or under any control or domination of the defendant, Henry C. Cutting, or that the majority, or any portion of the stockholders of said defendant, Monetary Trust Company, have been, or now are, under the complete control, or any control, and domination of said defendant, Henry C. Cutting.

[36]

These defendants further answering said paragraph II admit that none of said stockholders, or officers of said defendant, Monetary Trust Company, have taken any steps, or steps to bring suit, or institute any proceedings to establish the rights of defendant, Monetary Trust Company, and of said plaintiffs, and the other stockholders of said defendant, Monetary Trust Company, or to protect said plaintiffs by a proper, or any, decree of the Court.

These defendants further answering said paragraph II. deny that they have neglected or refused to bring any action or proceeding where the same was necessary or requisite for the maintenance of the rights of the stockholders of said corporation defendant.

These defendants further answering said paragraph II deny that the directors, or officers, of defendant, Monetary Trust Company, are, or ever were, under the control of the defendant, Henry C. Cutting, and deny that they, or any of them, are

not the *bona fide* owners and holders of shares of the capital stock of said company, or that sufficient shares of stock in said company to qualify said officers in accordance with the By-laws of said company have been issued to each of them by said defendant, Henry C. Cutting, or that through his influence or command, or in order that he might control the majority of the board of directors of said defendant, Monetary Trust Company, or its other officers.

Third. These defendants, and each of them, answering paragraph III of said third amended bill of complaint, say and each of them says: That they know not, and he and it knows not, and have not, and has not, been informed save by said complainants' [37] third amended bill, and cannot set forth as to their and his, and its belief, or otherwise whether the said complainants have truthfully set forth the matters in said paragraph mentioned, and in that behalf said defendants deny, and each of them denies, that the said Henry J. Woodward, one of the plaintiffs therein, became the equitable owner or holder, for a valuable consideration, or otherwise, of about six hundred (600), or any other number of shares of the par value of One Hundred Dollars (\$100) each, or of any other par value, of the capital stock of said defendant, Monetary Trust Company, on or about the 5th day of January, 1905, or at any other time, or that said Henry J. Woodward is now, or ever was, at all or any of the times stated in said third amended bill of complaint, the *bona fide*, equitable owner or



holder of said stock, or any part thereof, for a valuable consideration, or otherwise.

These defendants, further answering said paragraph III, deny that said Francis A. Woodward, one of the complainants herein, became the legal owner, or holder for a valuable consideration, or otherwise, of five (5) or any other number of shares of the par value of One Hundred Dollars (\$100), or of any other par value each of the capital stock of said defendant, Monetary Trust Company, on or about the 5th day of January, 1905, or at any other time, or at all, or that said F. A. Woodward is now, or ever was, at all or any of the times stated in said third amended bill of complaint, or has been the *bona fide*, or legal owner, or holder of said stock, for a valuable consideration, or otherwise, or at all, or that the plaintiffs herein were, or that each of them, was, a *bona fide* owner of said stock in the defendant corporation, Monetary Trust Company, at the time of each and all of the transactions complained of in said third amended bill.

These defendants further answering said paragraph III, admit that the Monetary Trust Company was the owner and holder [38] of eleven hundred and seventy-five (1175) shares of the par value of One Hundred Dollars (\$100) each of the capital stock of the Point Richmond Canal and Land Company, on and before the 20th day of December, 1906.

These defendants further answering said paragraph III deny that said defendant, Monetary Trust Company, ever since has been, or now is, the *bona fide* owner or holder of said eleven hundred

and seventy-five (1175) shares of its capital stock, or any part thereof, or has a full, or free, or clear title thereto.

These defendants further answering said paragraph III deny that such title to said shares is clouded by the acts of the defendants, or any act of the defendants, or either of them, as alleged in said third amended bill of complaint, or otherwise, or at all.

Fourth. These defendants answering paragraph IV of said third amended bill of complaint deny that said defendant, Henry C. Cutting, did not pay the par, or actual, or market value of said stock in cash, or turn over, or transfer to said defendant, Monetary Trust Company, any property, or rights, or perform any services, or services equal in value to the said stock.

These defendants further answering said paragraph IV deny that the defendant, Henry C. Cutting, acquired said stock without the payment of any sufficient cash consideration therefor, or turning over, or transferring to said company property, or rights, or performing services, or service for said company as a sufficient payment for, or upon said capital stock.

These defendants further answering said paragraph IV deny that said defendant, Henry C. Cutting, promised, or agreed with the defendant, Monetary Trust Company, and its officers, in that behalf duly authorized, at or before the time any of said stock was issued to him, that he would pay into the treasury of the [39] defendant, Monetary

Trust Company, Ten Dollars (\$10) per share for five hundred (500) shares of said stock, and (or) would also finance said company and place it in such a condition that it could safely proceed with its business in a proper method and manner.

These defendants further answering said paragraph IV deny that said Henry C. Cutting has failed to comply with, or perform his said agreement, or that he has only paid into the treasury of the company a few hundred dollars, but on the contrary said defendants allege that he has fully complied with his said contract and agreement,

Fifth. Answering paragraph V of said third amended bil of complaint these defendants, and each of them, deny that the records of the defendant, Monetary Trust Company, are assumed records.

Deny that the meeting of the board of directors of said Monetary Trust Company held on or about the 20th day of December, 1906, was an assumed meeting or that the records thereof were, or are assumed records, or an assumed record of said meeting, or of said Monetary Trust Company.

These defendants further answering said paragraph V admit that the records of said defendant, Monetary Trust Company, contained a statement that the following resolution was unanimously passed by the board of directors, viz.: "Mr. H. W. Wernse presented the check of H. C. Cutting for \$1,175 stating that Mr. Cutting desired to exercise his rights under the option given him by the Monetary Trust Company ratified and confirmed by the stockholders at their last meeting to purchase

1175 shares of the Point Richmond Canal and Land Company stock, held by The Monetary Trust Company, at \$1.00 per share.”

These defendants further answering said paragraph V deny that according to the By-laws of said company defendant the meeting held on the 20th day of December, 1906, was not a regular [40] meeting of the board of directors of the defendant, Monetary Trust Company.

These defendants further answering said paragraph V. deny that such meeting was not properly called in accordance with the By-laws and the statutes of the State of California.

These defendants further answering said paragraph V deny that the record of said meeting discloses that there were present at said meeting only directors Henry C. Cutting, one of the defendants herein, W. J. Morgan and H. W. Wernse, or that directors Albert Betz or H. B. Mayo, or either of them, were absent.

These defendants further answering said paragraph V admit that in accordance with the said By-laws of said corporation defendant three (3) Directors are required to be present to constitute a quorum for the transaction of any business and that as shown and disclosed by said record of said meeting the above recited resolution was passed unanimously and so voted for by Directors W. J. Morgan, H. W. Wernse and the defendant, Henry C. Cutting.

These defendants deny that said record is an assumed record of said meeting.



These defendants further answering said paragraph V admit that said Henry C. Cutting participated in the vote passing said resolution and voted for the passage of the same; and that under and by virtue of said resolution above quoted said defendant, Henry C. Cutting, claims that he became a *bona fide* owner and holder, for a valuable consideration, of the 1175 shares of the capital stock of the Point Richmond Canal and Land Company.

These defendants further answering said paragraph V deny that the said defendant, Henry C. Cutting's vote was necessary to the passage of said resolution, or that said defendant, Henry C. Cutting, was a disqualified director, or was not allowed to vote thereon. [41]

These defendants further answering said paragraph V deny that the said 1175 shares of the capital stock of the Point Richmond Canal and Land Company were on the 20th day of December, 1906, or for a long time prior thereto, of great value or of the par value of \$100 per share, or any other sum greater than \$1.00 per share.

These defendants admit that the shares at the present time are of a much greater value than \$1.00 per share, but the real and tangible value thereof said defendants are unable to admit or affirm at this time, or at any time since December 20th, 1906.

These defendants deny that said stock on said 20th day of December, 1906, or for long prior thereto, was or had been at any time practically the only asset of the defendant, Monetary Trust Company, of any appreciable monetary value.

These defendants further answering said paragraph V in that behalf allege that said shares on the 20th day of December, 1906, were of no greater value than \$1.00 per share, and that on November 5th, 1906, the said defendant, Henry C. Cutting, obtained from one A. N. Lewis an option for the purchase of two hundred and fifty (250) shares of the said Point Richmond Canal and Land Company stock at \$1.00 per share, said stock to be taken and paid for within sixty (60) days following November said 5th, 1906; that within said sixty (60) days the said defendant, Henry C. Cutting, availed himself of said option and purchased and paid for said two hundred and fifty (250) shares of stock at the price of One Dollar (\$1.00) per share.

These defendants further allege in answer to paragraph V that the defendant, Henry C. Cutting, on or about the 29th day of August, 1906, obtained from one Fred Reichert an option, privilege and right to purchase from said Fred. Reichert an option eleven hundred and eighty five (1185) shares of the capital stock of the Point Richmond Canal and Land Company at the price of One Dollar (\$1.00) per share; and that said option was to continue [42] from and including said date until and including the first day of May, 1907, and that the said defendant, Henry C. Cutting, under the terms of said option, had the right to avail himself of said privilege and the right to purchase said stock at any time without any further conference with said Reichert, and by applying said purchase price to the extent of Nine Hundred and Eight Dollars (\$908), upon an indebtedness owed by said Fred. Reichert to said Henry C. Cut-

ting; that thereafter and within the time specified the said defendant, Henry C. Cutting availed himself of said option.

These defendants further answering said paragraph V deny that said resolution was not properly or not legally passed by said board of directors of the defendant, Monetary Trust Company, and deny that said resolution was insufficient to transfer or give no authority to transfer to said defendant, Henry C. Cutting, said eleven hundred and seventy-five (1175) shares of stock of the Point Richmond Canal and Land Company, or any part thereof.

These defendants further answering said paragraph V deny that the check of the defendant, Henry C. Cutting, mentioned in the above quoted resolution was never cashed by the defendant, Monetary Trust Company, or by any of its officers, or anyone acting in its behalf, or that the same was returned to said defendant, Henry C. Cutting, or that he then or there pretended to borrow the same amount from the defendant, Monetary Trust Company.

These defendants further answering said paragraph V admit that said defendant, Henry C. Cutting, borrowed said sum of Eleven Hundred and Seventy-five Dollars (\$1,175), the proceeds of said check, from the defendant, Monetary Trust Company, and gave his note to the defendant, Monetary Trust Company, for the same amount that was specified in said check, to wit, the sum of Eleven Hundred and Seventy-five Dollars (\$1,175), which note is still outstanding, but these de-

defendants deny that said note is [43] wholly unpaid, but on the contrary allege that the interest has been paid on said note to the date of the commencement of this action, and One Hundred and Seventy-five Dollars (\$175) of the principal, leaving still remaining the sum of One Thousand Dollars (\$1,000) unpaid on said note, and drawing interest at the rate of eight per cent (8%) per annum, as provided therein.

Said defendants further answering said paragraph V admit that it is recited in the resolution above quoted that the defendant, Henry C. Cutting, decided to exercise his right under the option given to him to purchase said eleven hundred and seventy-five (1,175) shares of the stock of the Point Richmond Canal and Land Company.

These defendants further answering said paragraph V deny that in truth or in fact no option of any kind had at any time, or has since that time, or at all, been given to said defendant, Henry C. Cutting, or any other persons or person to purchase said stock from the defendant, Monetary Trust Company.

These defendants further answering said paragraph V deny the fact that no stockholders' meeting was held at or about that time, to wit, the 20th day of December, 1906, or at any other time ratifying said transaction, but in that behalf said defendants allege that more than three-fourths of the stockholders of said Monetary Trust Company ratified and confirmed the sale of said stock.

These defendants further answering said para-



graph V deny that there are no minutes in the minute-books of said defendant, Monetary Trust Company, of any meeting of the stockholders of said company at or about or before the 20th day of December, 1906, and deny that there is no record in any of the minutes of any of the meetings of the stockholders of said defendant, Monetary Trust Company, in any way referring to the granting, or confirming, or ratifying of any option for the purchase of said eleven [44] hundred and seventy five (1175) of stock in the Point Richmond Canal and Land Company, or any part thereof, or any mention of any ratification, or confirmation of any option given by said defendant, Monetary Trust Company, or anyone in its behalf.

These defendants further answering said paragraph V deny that said resolution above quoted and set forth in said third amended bill of complaint, in paragraph V thereof, set forth other matters or facts which did not exist, or was passed for the fraudulent purpose of allowing the defendant, Henry C. Cutting, to ostensibly or improperly acquire the right, or title of the defendant, Monetary Trust Company, in or to said eleven hundred and seventy-five (1175) shares of the capital stock of the Point Richmond Canal and Land Company, when in truth or in fact no sale of said stock had ever been legally authorized or made. These defendants deny that the defendant, Henry C. Cutting, had never paid anything upon the purchase price thereof, or that the entire transaction was fraudulently had by the defendant, Henry C. Cutting, and (or) the directors of the defendant,

Monetary Trust Company, or that said directors of The Monetary Trust Company, or either of them, were then, or ever since have been, or ever had been completely, or otherwise, or at all, under the control or domination of said defendant, Henry C. Cutting, for the purpose of cheating or defrauding the plaintiffs, or either of them, or of The Monetary Trust Company, or the other stockholders of said company, or any of them, out of all or any interest in said stock, or otherwise, or at all, but to the contrary said defendants allege that said directors, and each of them, of said Monetary Trust Company, never were under the control or domination of said defendant, Henry C. Cutting, or any other person.

These defendants further answering said paragraph V deny that for many years last past, or at any time, or at all, The Monetary Trust Company has not been engaged in the carrying [45] on of any regular business, or has not required the services of any salaried officers, or officer, in its employment.

These defendants further answering said paragraph V deny that said Henry C. Cutting, in the operation of carrying on his own private business, or otherwise, or at all, has ostensibly, or otherwise, or at all, caused his own private stenographer or secretary employed by him in his private business, to be employed by said defendant, Monetary Trust Company, on salaries which the said defendant, Henry C. Cutting, has fraudulently, or otherwise, or at all, caused to be paid out of the assets of said defendant, Monetary Trust Company.

These defendants further answering said paragraph V deny that the business of said defendant, Monetary Trust Company, has not for many years past, or at any time, required any office, and deny that said Henry C. Cutting has caused to be paid out of the assets of said defendant, Monetary Trust Company, large sums, or any sum whatsoever, for rent, or for offices, which he, the said defendant, Cutting, has used exclusively in his own behalf, or for his own private business.

These defendants further answering said paragraph V allege and show that no salary has been paid, or that no salaries have been paid by said Monetary Trust Company, for any service whatsoever rendered to said Henry C. Cutting, or any office rent or charges whatsoever for the private business or offices, or work of said defendant, Henry C. Cutting.

Sixth. These defendants, for answer to paragraph VI of said third amended bill of complaint, deny that said defendant, Monetary Trust Company, has ceased to transact any business, and deny that defendant, Henry C. Cutting, procured a majority or any of the directors of said company to be elected, who are, or were, or have been, completely, or otherwise, or at all controlled or dominated by said defendant, Henry C. Cutting, and deny [46] that said defendant, Henry C. Cutting, and said directors, or any of them, have purchased a large, or any amount of office furniture, or made elaborate, or expensive, or other, or any, changes, or change in the interior of said offices, or any of them, or purchased many hundred dollars worth of office supplies, or of any sup-

plies whatsoever, or that all of which, or any of which, were for the sole, or any use, or benefit of said defendant, Henry C. Cutting, or some, or any of the officers, or directors, or any of them, of the defendant, Monetary Trust Company, or that they, or any of them, are or always were, controlled, or dominated by him, the said Cutting, or not used by, or for the defendant, The Monetary Trust Company, or in its business.

These defendants further answering said paragraph VI deny that the said defendant, Henry C. Cutting, or the directors, or any of them, are, or were, controlled, or dominated by said Cutting, or have uniformly, or at all times, or at any time, or at all, caused payment for all, or any of such or any furniture or fixtures, or changes, or supplies, to be made out of the moneys or assets of the defendant, Monetary Trust Company, amounting to a large, or any sum of money, or that the exact amount of which cannot be ascertained from an examination of the books, or records of said Monetary Trust Company.

These defendants further answering said paragraph VI deny that the money so unlawfully, or otherwise, or at all, misapplied, or misappropriated, or appropriated, or otherwise, or at all, by Henry C. Cutting, exceeds the sum of Five Thousand Dollars (\$5,000), or any other sum whatsoever.

Seventh. These defendants answering paragraph VII of said third amended bill of complaint deny that by the official financial statement of the defendant, Monetary Trust Company, bearing date May 14th, 1913, the items set forth in paragraph VII con-



stituted all of the assets of said Monetary Trust Company, or that the liabilities were as stated in said paragraph VII.

These defendants further answering said paragraph VII [47] deny that there is nothing contained in said official financial statement which in any way or manner discloses the date of any of the respective notes mentioned therein or the consideration therefor; and deny that there is nothing contained therein which shows or discloses how or why the defendant, Monetary Trust Company, holds Ten Hundred and Ninety-three Dollars (\$1,093) and Three Hundred Seven and 51/100 Dollars (\$307.51) interest in trust for the Pacific Underwriting and Trust Company, nor whether the same is or has been held as notes, or obligations, if cash, or why, or how, or for what purpose any trust was ever created, or that any trust now exists, or has ever existed, or that plaintiffs are without any information in relation thereto.

These defendants further answering said paragraph VII admit that in said financial statement above quoted it is set forth that the note of W. H. H. Hart is secured for 100,000 shares of the capital stock of the Eldorado Gold Basin Dredging Company, but that said financial report fails to disclose that said note of W. H. H. Hart is also secured by 300 shares of the capital stock of The Monetary Trust Company; that at the time said note was given said W. H. H. Hart pledged and delivered to said Monetary Trust Company three hundred (300) shares of the capital stock of said company as security for the payment

of said note and the interest thereon, and that said three hundred shares so pledged should have been shown upon said financial report as having been pledged as security for the payment of said note; but deny that said three hundred (300) shares of stock so pledged by said W. H. H. Hart is a further asset of said Monetary Trust Company.

These defendants further answering said paragraph VII deny that the said defendant, Monetary Trust Company, has received since its organization large sums of money from the sale of its capital stock, or from other sources, or that such sums in [48] the aggregate amount to over Fifteen Thousand Dollars (\$15,000), or any other sum.

These defendants further answering said paragraph VII deny that all the legitimate expenses, or outlays of said Monetary Trust Company, during the time it was doing business, determined from a very liberal or any estimate would not exceed the sum of Three Thousand Dollars (\$3,000), but to the contrary would amount to much greater sums, the amount of which these defendants are at this time unable to state.

These defendants further answering paragraph VII deny that said defendant, Henry C. Cutting, has fraudulently, or otherwise, or at all, misapplied, or misappropriated, or dissipated all or any of the assets of said defendant, Monetary Trust Company.

Eighth. Answering paragraph VIII of said third amended bill of complaint, these defendants, and each of them, deny that shortly after the defendant, Henry C. Cutting, had agreed to purchase five hun-

dred (500) shares of stock of the defendant, Monetary Trust Company, at and for Ten Dollars (\$10) per share, said company undertook the organization and promotion of the Point Richmond Canal and Land Company; that said Monetary Trust Company paid all of the expenses of the organization of said Point Richmond Canal and Land Company.

These defendants further answering said paragraph VIII deny that the Monetary Trust Company became the owner of an option or contract to purchase four hundred (400) acres of land, or any land, in Point Richmond known as the South Marsh, situate in Contra Costa County, State of California, for any sum whatsoever.

These defendants further answering said paragraph VIII aver and admit that Fred. Reichert became and was the owner of an option or contract to purchase four hundred (400) acres of land in Point Richmond known as the South Marsh, situated in Contra [49] Costa County, State of California, for Three Hundred and Thirty-six Thousand Dollars (\$336,000) out of Four Hundred Thousand Dollars (\$400,000) worth of bonds secured on said real estate to be purchased. That the defendant Monetary Trust Company, obtained said option or contract from Fred. Reichert; that there was an agreement and understanding between The Monetary Trust Company, and said Reichert, that all of the capital stock of the Point Richmond Canal and Land Company should be issued.

These defendants further answering said paragraph VIII deny that the stock of said Point Rich-

mond Canal and Land Company should be issued one-fourth to said Reichert, one-fourth to said Mayo, and one-half to said Monetary Trust Company, but in that behalf these defendants allege that the directors of the Point Richmond Canal and Land Company were each to subscribe for and receive ten (10) shares, and that the balance of said stock was to be issued fifty-one per cent (51%) to the Monetary Trust Company and forty-nine per cent (49%) to said Reichert, or as he might direct.

These defendants further answering said paragraph VIII admit that before said corporation, Point Richmond Canal and Land Company, was organized it was agreed that it should be capitalized at five thousand (5,000) shares of the par value of One Hundred Dollars (\$100) per share.

These defendants further answering said paragraph VIII deny that defendant, Monetary Trust Company, should own or have one-half or any part or portion of the Sixty Four Thousand Dollars (\$64,000) worth of bonds of said Company out of the Four Hundred Thousand Dollars (\$400,000) worth of bonds so to be issued by the said Point Richmond Canal and Land Company.

These defendants further answering said paragraph VIII admit that said Four Hundred Thousand Dollars (\$400,000) worth of bonds were duly issued at the sole expense of the Monetary Trust [50] Company, and Three Hundred and Thirty-six Thousand Dollars (\$336,000) thereof were delivered to the owner of said land in payment of the purchase price thereof; and the remaining Sixty-Four Thousand



Dollars (\$64,000) worth of said bonds were owned by said Point Richmond Canal and Land Company and were intended to be used by it in the development and sale of said property.

These defendants further answering said paragraph VIII deny that subsequently to the issuance of said bonds The Monetary Trust Company turned over and delivered one hundred and fifty (150) shares of said stock in the Point Richmond Canal and Land Company to A. N. Lewis.

These defendants further answering said paragraph VIII admit that the said Point Richmond Canal and Land Company became the owner of the legal title in fee simple of all of said land subject only to the Four Hundred Thousand Dollars (\$400,000) worth of bonds which had been issued in payment of said property, and deny that said Monetary Trust Company became the owner of two thousand five hundred (2,500) shares of the said stock of said Point Richmond Canal and Land Company, ten (10) shares each to the Board of Directors, or said Fred. Reichert became the owner of twenty-four hundred and fifty (2450) shares of said stock of said Point Richmond Canal and Land Company.

These defendants further answering said paragraph VIII deny that immediately after said transaction, or at any other time, or at all, the defendant, Henry C. Cutting, proposed to The Monetary Trust Company that he would finance the Point Richmond Canal and Land Company or furnish all or any part of the funds necessary to develop or sell said lands, provided he could obtain the control of the stock of

said company, or otherwise, or at all, or that he would buy Ten Thousand Dollars (\$10,000) worth, or any other amount of the bonds, or that when that amount was spent he would raise whatever further money might be necessary, or that the [51] defendant, Monetary Trust Company, accepted said proposition, or any proposition, or delivered to said defendant, Henry C. Cutting, one-half of the twenty-three hundred and fifty (2350) shares, or any shares of the stock of the Point Richmond Canal and Land Company then owned by it.

These defendants further answering said paragraph VIII admit that said Henry C. Cutting procured sufficient stock to give to said defendant, Henry C. Cutting, a majority of all the capital stock of the Point Richmond Canal and Land Company then issued and the control of said Company.

These defendants further answering said paragraph VIII deny that the defendant, Monetary Trust Company, obtained an option, or contract, from Harry B. Mayo in reference to said land mentioned in said paragraph.

These defendants further answering said paragraph VIII deny that said defendant, Henry C. Cutting, paid nothing for said stock, or utterly, or otherwise, or at all, failed to carry out his agreement to buy Ten Thousand Dollars (\$10,000) worth of said, or any bonds, or failed to finance said Point Richmond Canal and Land Company, after he obtained control of said Company.

Ninth. Answering paragraph IX of said third amended bill of complaint, these defendants, and

each of them, deny that all, or singular, or any of the acts or doings of the defendant, Henry C. Cutting, as alleged, or otherwise, or at all, were, or are, or ever were fraudulent, or intended so to be, or were done or committed by said defendant, Henry C. Cutting, for the express, or any purpose, of cheating or defrauding the said Monetary Trust Company out of all, or any, of its assets, or property, or rights, or business, or of defrauding or cheating said plaintiffs, or either of them, or all the other, or any of the other stockholders, or any stockholder, out of their, his, her, or its rights, in or to any value in the assets, or any asset of said defendant, The [52] Monetary Trust Company, or that said defendant, Henry C. Cutting, purposely, or otherwise, or at all, intentionally, or otherwise, or at all, fraudulently, or otherwise, or at all, concealed his fraudulent practices, or practice, or any practices, or practice, in the performance of said, or any, acts, or doings, or any of them, from said plaintiffs, or either of them, or from the other stockholders, or any of them, by causing to keep, or did keep, insufficient, or inaccurate books of account, or any insufficient, or inaccurate book of account, or corporate record, or records, of the affairs of said company, or lulled said plaintiffs, or either of them, or the other stockholders, or any of them, into seeming, or other security by any statement, or statements made by him, or any other person, or at all, or that all, or any, of the stockholders of the defendant, Monetary Trust Company, should be, or would be, jointly, or otherwise, interested with him, the said Henry C. Cutting, in all, or any, profits

which might, or would, or could grow out of any of his transactions, or any transaction with, or pertaining to, the business, or property, or affairs of the defendant, Monetary Trust Company, or that he, the said Henry C. Cutting, should, or would hold the title of eleven hundred and seventy-five (1175) shares, or any other number of shares, or any shares, at all of the stock in the Point Richmond Canal and Land Company, in trust for said defendant, Monetary Trust Company.

These defendants, further answering said paragraph IX, deny that by said acts, or any act of said defendant, Henry C. Cutting, as alleged, or otherwise, or at all, in so far as the same, or any of them, were known to the plaintiffs, or either of them, or otherwise, or at all, they, or each of them, were made to believe or did believe that the acts, or any act of said defendant, Henry C. Cutting, as alleged, or otherwise, or at all, were for the best interests, or for any interest, of the defendant, Monetary [53] Trust Company, or all, or any of its stockholders.

These defendants, further answering said paragraph IX, admit that said defendant, Henry C. Cutting, was honest in the performance of all of his acts in connection with and appertaining to said Monetary Trust Company, and its affairs, and to said Point Richmond Canal and Land Company, and its affairs.

These defendants, further answering said paragraph IX, admit that said plaintiffs, and each of them, never made any careful, or other investigation of the books of account, or records of transactions of



said Monetary Trust Company, or ever applied to said company for any examination whatsoever of said records and transactions of said defendant, Monetary Trust Company, or of the acts or doings of said defendant, Henry C. Cutting.

These defendants, further answering said paragraph IX, deny that said plaintiffs, or either of them, or any other person, subsequently, or at all, discovered that said defendant, Henry C. Cutting, had been acting dishonestly, or fraudulently, with reference to the business affairs, or any affair, of the defendant, Monetary Trust Company, or with its assets, or any asset, or property, or with the stockholders of said company, or any of them, or that they did not discover said fraud, or any of said acts or alleged fraudulent practices, or any of them, until about the month of January, 1913, or that immediately after ascertaining the facts, or any of them, that the conduct of said Henry C. Cutting, as alleged, or otherwise, was fraudulent or intended for the purpose of defrauding the plaintiffs, or either of them, or for the purpose of defrauding The Monetary Trust Company, or the other stockholders, or any stockholder, of said company, out of all, or any of the property, or all, or any of the assets of said company, or the value of said stock, or any part thereof, or that plaintiffs, or either of them, instituted this suit for the purpose of submitting the entire matter to the Court, or protecting the value of their stock, or requiring [54] said defendant, Henry C. Cutting, to account for all, or any moneys, or property of the defendant, Mone-

tary Trust Company, which may have come, or did come into his hands since its incorporation, or to replace in the treasury of said company all, or any of the moneys, or stocks, or stock, or other securities or any of them, for the benefit of the stockholders, or any stockholder of said company, or to recover judgment or decree against said defendant, Henry C. Cutting, requiring him to answer for the same, or otherwise, or at all.

Said defendants, further answering said paragraph IX, deny that said defendant, Henry C. Cutting, was the president of the defendant, Monetary Trust Company, or became president thereof, until long after the purchase of said eleven hundred and seventy-five (1175) shares of the capital stock of said Point Richmond Canal and Land Company, from the defendant, Monetary Trust Company, on the 20th day of December, 1906.

These defendants, further answering said paragraph IX, deny that at all times mentioned in said bill of complaint, or at any of the times, or at all, the said defendant, Henry C. Cutting, acted in a fiduciary capacity for, or towards the plaintiffs or either of them, or for, or towards each, or any, stockholder of said company, with reference to the assets, or any asset, or property, or business, of said defendant, Monetary Trust Company, or that it was his duty, while acting in such fiduciary capacity, or otherwise, or at all, not to deal in, or with any of said assets, or asset, or property, or business, for individual benefit, or that said defendant, Cutting, was bound to, or obliged to conserve, or care for such assets, or any of

them, or care for such property or any of it, or such business, or any business, for the benefit or protection of said company, or of all, or any of its stockholders.

These defendants, further answering said paragraph IX, deny that said defendant, Henry C. Cutting, has openly, or otherwise, or at [55] all violated such duties, or any duty, or has misapplied, or misappropriated, or converted all or any of the assets, or any asset, or property, or business of said Monetary Trust Company to his own individual use, or benefit, as alleged in said third amended bill of complaint, or otherwise or at all.

These defendants, further answering said paragraph IX, deny that large amounts, or any amount of money, or any money, or any property, belonging to The Monetary Trust Company, have come into the possession of the defendant, Henry C. Cutting, or that said Henry C. Cutting has misapplied, or misappropriated, or converted the same, or any part or portion thereof to his own use.

These defendants, further answering said paragraph IX, deny that said plaintiffs have no plain, or speedy, or adequate remedy at law, or that by reason thereof said plaintiffs bring said third amended bill of complaint in a court of equity where all such matters of accounting or fraud are fully cognizable, but on the contrary said defendants allege that said plaintiffs have a full and adequate remedy at law of all matters of which they complain.

Tenth. These defendants, and each of them, further answering plaintiffs' third amended bill of com-

plaint, and in addition to the foregoing answer, aver that the cause of action, if any there be, arising to the complainants on account or by reason of the several allegations and complaints in their said third amended bill contained, did not accrue within three years prior to the filing of the original bill of complaint in this suit; and this allegation the defendants make in bar of the said complainants' bill and in bar of said complainants' said third amended bill, and pray that they may have the same benefit therefrom as if they had formally pleaded the same.

Eleventh. These defendants, and each of them, further answering plaintiffs' third amended bill of complaint, and in addition to the foregoing answer, aver that the cause of action, if [56] any there be, arising to the complainants on account or by reason of the several allegations and complaints in their said third amended bill contained, did not accrue within four (4) years prior to the filing of the original bill of complaint in this suit; and this allegation the defendants make in bar of the said complainants' bill and in bar of said complainants' said third amended bill, and pray that they may have the same benefit therefrom as if they had formally pleaded the same.

Twelfth. These defendants, and each of them, further answering plaintiffs' third amended bill of complaint, and in addition to the foregoing answer, aver that the cause of action, if any there be, arising to the complainants on account or by reason of the several allegations and complaints in their said third amended bill contained, did not accrue within



three (3) years before the bill of complaint was filed, and after the discovery by complainants of the alleged fraudulent acts of said defendant, Henry C. Cutting, and of facts sufficient to place complainants on notice thereof, and prior to the filing of the original bill of complaint in this suit; and this allegation the defendants make in bar of the said complainants' bill and in bar of said complainants' said third amended bill, and pray that they may have the same benefit therefrom as if they had formally pleaded the same.

Thirteenth. These defendants further answering said complainants' third amended bill of complaint allege that said plaintiffs are guilty of laches in that it appears that the act complained of in selling the capital stock of the Point Richmond Canal and Land Company occurred in October, 1906, and in that no suit had been brought in the meantime to set aside said sale, and in that it appears that said first amended bill in equity in this suit was not filed until the 19th day of February, 1913, and that by reason thereof, said defendants allege that plaintiffs' causes [57] of action are barred.

Fourteenth. These defendants, further answering plaintiffs' third amended bill of complaint alleged that this suit was and is a collusive suit on the part of said complainants in that the same was brought in collusion with one H. B. Mayo for the purpose of giving this Court jurisdiction, when in truth and in fact said suit is being prosecuted at the instance and for the benefit of said H. B. Mayo, as well as of said complainants, and that by reason thereof

this Court is without jurisdiction to hear or try or determine said action.

These defendants for further answer to plaintiffs' third amended bill of complaint deny all unlawful combination and confederacy in the said bill charged, without that any other matter or thing material or necessary for these defendants to make answer unto, and not herein and hereby well or sufficiently answered unto, confessed or avoided, traversed or denied, is true to the knowledge or belief of these defendants. All which matters and things these defendants are ready to aver, maintain and prove, as this honorable court shall direct, and humbly pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

WM. H. H. HART,  
Solicitor for Defendants.

[Endorsed]: Filed Apr. 29, 1914. [58]

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*In the District Court of the United States, Northern  
District of California, Second Division.*

EQ.—No. 2.

HENRY J. WOODWARD and FRANCIS A.  
WOODWARD,

Plaintiffs,

vs.

HENRY C. CUTTING and THE MONETARY  
TRUST COMPANY, a Corporation,  
Defendants.

**Interlocutory Decree.**

This cause having been heretofore heard and submitted, and the Court being duly advised:

IT IS ORDERED, ADJUDGED AND DECREED that the contract purporting to have been entered into on or about December 20, 1906, between certain members of the board of directors of the defendant The Monetary Trust Company, and the defendant Henry C. Cutting, which purports to transfer 1,175 shares of the capital stock of the Point Richmond Canal and Land Company, a California corporation, from the defendant The Monetary Trust Company to the defendant, Henry C. Cutting, was and is fraudulent and void, and vested no title to said shares of stock in said Cutting, but said shares of stock still remain the property of The Monetary Trust Company, and the latter is entitled to have said shares restored to its name upon the books of said Point Richmond Canal and Land Company;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant Henry C. Cutting has no title or right of property in or to the income, profits, dividends, or benefits of any character received by, or derived to the benefit of, said defendant from or on account of said 1,175 shares of the capital stock of the said Point Richmond Canal and Land Company since the said attempted transfer thereof to said defendant, or while the same has stood in his name; and the plaintiffs, on behalf of said Monetary Trust Company, are entitled to have an accounting from the defendant of [60] all such profits,

dividends, or benefits, if any, which have been received or derived by, to, or for the benefit of said defendant from said stock;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiffs, for and on behalf of said Monetary Trust Company, are entitled to an accounting from the said defendant, Henry C. Cutting, of all moneys due and owing, if any found, from said defendant to said Monetary Trust Company for and on account of that certain other 1,175 shares of the capital stock of said Point Richmond Canal and Land Company sold and transferred by said Monetary Trust Company to said defendant previously to said 20th day of December, 1906, and likewise a full accounting of any and all bonds, evidences of indebtedness, and interest, or income therefrom, and of all other property of every kind of said Monetary Trust Company, if any, which may be found to have been taken by or have come into the possession of said defendant Henry C. Cutting, and of any and all sums of money or funds of said Monetary Trust Company paid, laid out or expended by or on behalf of said defendant on account of office or room rents, or other expenses of any character, or of any sums of money whatsoever belonging to said Monetary Trust Company in any wise appropriated to the use or benefit of said defendant Henry C. Cutting; and generally to an accounting of all financial or money transactions of any and every character had and occurring between said Monetary Trust Company and said defendant Henry C. Cutting during the period covered by the bill herein;



IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiffs, on such accounting, be entitled to cause and have the examination of the defendant Henry C. Cutting and the officers and directors of the defendant, The Monetary Trust Company, *ore tenus*, or otherwise, and also to cause the production of books, vouchers, and documents of the defendant Henry C. Cutting and the defendant The Monetary Trust [61] Company in any way relating to the transactions herein covered;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiffs have and recover on behalf of said Monetary Trust Company from the defendant Henry C. Cutting all sums found on such accounting to be due from said defendant to said Monetary Trust Company, together with their costs, charges, and disbursements in this suit to be taxed.

Dated this 6th day of October, 1915.

WM. C. VAN FLEET,  
United States District Judge.

[Endorsed]: Filed and entered Oct. 6th, 1915.  
[62]

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**Substitution of Solicitors for the Defendant, Henry C. Cutting.**

The defendant in the above-entitled suit, Henry C. Cutting, hereby substitutes Jacob M. Blake, Esq., as his solicitor therein in the place and stead of W. H. H. Hart, Esq.

H. C. Cutting—Oct. 6, '15.

I hereby consent to the substitution of Jacob M. Blake, Esq., as solicitor for the defendant, Henry C. Cutting, in the above-entitled action, in my place and stead.

Oct. 6th, 1915.

WM. H. H. HART.

The substitution of myself as the solicitor for the defendant, Henry C. Cutting, in the above-entitled action in the place and stead of W. H. H. Hart, is hereby accepted.

San Francisco, Cal., October 7th, 1915.

JACOB M. BLAKE. [63]

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**Notice of Substitution of Solicitors.**

To the Above-named Plaintiff and to Your Solicitors,  
Clayberg & Whitmore:

YOU AND EACH OF YOU WILL PLEASE  
TAKE NOTICE that Jacob M. Blake, Esq., has been  
substituted as the solicitor of record for the defendant,  
Henry C. Cutting, in the above-entitled suit.

San Francisco, California, October 7, 1915.

JACOB M. BLAKE,

Solicitor for the defendant, Henry C. Cutting.

Due service of the within notice of substitution of  
solicitors and receipt of a copy thereof is hereby acknowledged at San Francisco, California, this 8 day  
of October, 1915.

JNO. B. CLAYBERG,  
CLAYBERG & WHITMORE,  
Solicitors for Complainants. [64]

**Notice of Time of Hearing of Petition for Rehearing.**

To the Above-named Complainants, and to Clayberg & Whitmore, Esqs., Your Solicitors, and to the Above-named Defendant, Monetary Trust Company, and to your Solicitor, William H. H. Hart, Esq.:

YOU AND EACH OF YOU WILL PLEASE HEREBY TAKE NOTICE, That the defendant, Henry C. Cutting, in the above-entitled suit intends to and will petition and move for a rehearing herein, and that said petition will be brought on for hearing in the above-entitled court and cause on Monday, the 18th day of October, 1915, at the hour of ten o'clock A. M., of said day, or as soon thereafter as counsel can be heard, at the courtroom of said court, Second Division thereof, in the Postoffice Building at the corner of Seventh and Mission Streets, in the city and county of San Francisco, State of California.

Said motion will be based upon the petition for rehearing hereto attached and made a part of this notice of motion.

San Francisco, October 13th, 1915.

JACOB M. BLAKE,

Solicitor for the Defendant, Henry C. Cutting.

[65]

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**Petition for Rehearing.**

To the Honorable WILLIAM C. VAN FLEET,  
Judge of the Above-entitled court:

Your petitioner, Henry C. Cutting, respectfully

represents and shows this Honorable Court as follows:

1. That since the trial, argument and decision of the above-entitled suit in equity, your petitioner has discovered certain new evidence of which he did not know and could not have known by reasonable diligence at the time of the hearing of this suit; that said evidence is material to the proper trial of the issues herein and could not be produced at the trial because of accident and surprise which ordinary prudence could not have guarded against.

2. Your petitioner respectfully further represents that at the time of the trial he was not advised of any rule of the above-entitled court to the effect that the sole solicitor of record for your petitioner at said trial could not be a witness on behalf of your petitioner without waiving his right to be heard upon the argument of said cause; that only since the trial, argument and decision of the above-entitled cause has your petitioner been informed of the materiality of the testimony of the sole solicitor who represented him at the trial hereof and who was prevented from being a witness [66] thereat because of the operation of the aforesaid rule of court; that the action of his said solicitor at that time in electing to preserve his right to argue said cause instead of becoming a witness in behalf of your petitioner was entirely unexpected by your petitioner, and took place under circumstances, and has resulted in consequences which ordinary prudence and foresight could not have guarded against so far as your petitioner is concerned, and created a



condition of an entirely unexpected character which your petitioner was unprepared to meet and the detrimental result of which he was not in a position to anticipate.

3. That since the trial, argument and decision in the above-entitled cause your petitioner has been informed and he, therefore, alleges that proof of the following facts would have been material and relevant to rebut the charges of actual fraud contained in complainants' bill of complaint with reference to his alleged purchase of 1175 shares of the capital stock of the Point Richmond Canal & Land Company from the defendant, The Monetary Trust Company, on or about the 20th day of December, 1906:

(a) The fact that his sole solicitor of record at the time of the trial of the above-entitled cause, together with one Henry Mayo and persons other than your petitioner, were the substantial and beneficial owners and holders of record of approximately two-thirds of all the subscribed and issued capital stock of the Monetary Trust Company, and that all of said persons, other than your petitioner herein were, at the time of said alleged fraudulent purchase of said 1175 shares of Point Richmond Canal & Land Company's stock by your petitioner from said Monetary Trust Company, the substantial and beneficial owners and holders of record of said two-thirds of said capital stock of said Monetary Trust Company in approximately [67] the same proportions as it is now owned.

(b) That at all times subsequent to the organization of the Monetary Trust Company and prior to

said alleged fraudulent purchase of said 1175 shares of stock by your petitioner as aforesaid, and for more than six months after said alleged fraudulent purchase, your petitioner was a nonresident of the State of California and was a resident of the State of Nevada and engaged in conducting a large mercantile business at Tonopah in said State; that during all of said last-mentioned times he was rarely in the city and county of San Francisco, State of California, the place where the principal business of the Monetary Trust Company was carried on, and that during all of said times your petitioner was not engaged in any regular business or employment in said State of California and employed no attorney or counsel in said city and county of San Francisco or elsewhere in State; and that during all of said time your petitioner's solicitor of record in this case at the time of the trial was the general counsel and one of the executive committee of the defendant Monetary Trust Company, and that he is still the general counsel of said trust company. That said general counsel of said trust company did not become the personal counsel of your petitioner until long after the time of the alleged fraudulent purchase of said 1175 shares of stock by your petitioner from said trust company; that said general counsel for said trust company was one of its original organizers and promoters and has been from the beginning and still is, one of its substantial and principal stockholders.

(c) That your petitioner only agreed to take up the bonds of the Point Richmond Canal & Land

Company in the amount of approximately ten thousand dollars' worth after the Monetary Trust Company had called one Mr. Reichert to its assistance [68] and had failed to finance the Point Richmond Canal & Land Company, and that he purchased said amount of bonds from said Point Richmond Canal & Land Company upon the condition and with the understanding that he should receive 2350 shares of the stock of the Point Richmond Canal & Land Company as a bonus, and that The Monetary Trust Company should receive 1175 shares of the stock of the Point Richmond Canal & Land Company for the services already performed by the trust company in organizing and attempting to finance the Point Richmond Canal & Land Company, and that he never entered into any contract with the trust company for the purchase of land company bonds, nor into any agreement with the trust company to carry at his own cost and expense its interest in said 1175 shares of stock of the Point Richmond Canal & Land Company, or that he would buy any more bonds of the latter company for the purpose of improving the land company's lands at Point Richmond.

(d) That at the time of the transaction last aforesaid, to wit: on or about March 27th, 1905, the land of the Point Richmond Canal & Land Company was known by all of the stockholders of record of the Monetary Trust Company, including your petitioner's solicitor at the time of the trial, not to be worth anything like the amount of its bonded indebtedness, that the city of Richmond, California, near where the land of the company was situated and upon the

growth of which the value of the land depended, was not incorporated and had a population of about — people, and that the value of said land was not appreciably enhanced by the expenditure upon it for improvements of the proceeds of the sale to your petitioner of said ten thousand dollars' worth of bonds.

(c) That at the time of the alleged fraudulent purchase by your petitioner from the Monetary Trust Company of said 1175 shares of the stock of the Point Richmond Canal & Land [69] and to wit, on or about the 20th day of December, 1906, it was known to all the stockholders of record of the Monetary Trust Company that the said land of the Point Richmond Canal and Land Company was not worth the amount of the outstanding bonds against it, and that its value was entirely speculative and was dependent upon the future growth of said city of Point Richmond, and upon the expenditure upon said land of large sums of money for permanent improvements by way of dredging deep water channels and grading streets through, over and upon said land, and that at said time last aforesaid the said city of Richmond had a population of only — people; that each and all of said stockholders of record of said Monetary Trust Company knew that there was no way of raising money for the improvement of said land at the time last mentioned, save and except by assessing the stock of the Point Richmond Canal & Land Company or by selling its bonds; that each and all of said stockholders of record of said trust company and its general



counsel knew that there was no market for said bonds, and that your petitioner was the owner of two-thirds of all the capital stock of the Point Richmond Canal & Land Company, or that your petitioner had options on or had purchased 1175 shares of said stock from the said Reichert and 250 shares of said stock from one Lewis, the vice-president of the Point Richmond Canal & Land Company at the rate of One Dollar per shares, and that said stock gave your petitioner the control of more than three-fourths of all the subscribed and issued capital stock of said Point Richmond Canal & Land Company; that they also knew that the transfer of said stock from the said Reichert and the said Lewis to your petitioner involved, or would involve a *bona fide* sale thereof. [70]

(f) That some time prior to the alleged fraudulent purchase of said 1175 shares of the land company's stock from the trust company by your petitioner, your petitioner offered and proposed to all the stockholders of record and to the general counsel of said Monetary Trust Company that an assessment be levied upon the stock of the Point Richmond Canal & Land Company to raise money for development purposes; that said offer was not accepted by the Monetary Trust Company and the proposition was made to said trust company that your petitioner should purchase the 1175 shares of the Point Richmond Canal & Land Company stock owned by the Monetary Trust Company at the same price per share that your petitioner had bought the stock from the said Reichert and Lewis; that your peti-

tioner then and there inquired of the general counsel of the trust company if he could legally purchase said 1175 shares of stock from the Monetary Trust Company, and that he was advised by him that he could do so; that with the knowledge and consent of all the stockholders and directors of said Monetary Trust Company, the executive committee thereof by and through the secretary and general counsel, they being two out of three members of said executive committee, and about sixty days prior to said 20th day of December, 1906, gave your petitioner an option in writing to purchase said 1175 shares of stock at the price of one dollar per share and that said transfer of said stock from said trust company to your petitioner was a *bona fide* sale thereof for value on the part of both the said trust company and your petitioner.

(g) That thereafter and continuously from the date of said purchase of said 1175 shares of stock as aforesaid to the present time, and with the full knowledge, acquiescence and consent of all, and without any protest or dissent, except the filing of this suit, of any of the stockholders of record, or of any of the directors of the Monetary Trust Company, [71] your petitioner has held, controlled and voted said 1175 shares of stock in the Point Richmond Canal & Land Company as his own, and that, upon the strength of his faith in his legal ownership thereof, he has, with the full knowledge, acquiescence and understanding upon the part of all of the stockholders of record of said Monetary Trust Company and of its general counsel that your petitioner

claimed the said 1175 shares of stock as his own, expended large sums of his own money in the development and improvement of the property of the Point Richmond Canal & Land Company, and that during all of said last-mentioned time and to the date of the commencement of this suit, and with the knowledge, acquiescence, and understanding upon the part of all the other owners and holders of record of the stock of the Monetary Trust Company and of the general counsel of said company of your petitioner's claim of title to said 1175 shares of stock, your petitioner has been constantly changing his position in relation to the beneficial ownership of said 1175 shares of stock to his great financial injury and detriment, and to the equally great financial benefit of all the other owners of the capital stock of the Monetary Trust Company, if a rescission of the sale of said 1175 shares of stock is decreed in this suit; that the record ownership and the beneficial ownership, so far as the same is known to your petitioner, upon March 27th, 1905, the date of the transfer by the said Reichert of said 1175 shares of Point Richmond Canal & Land Company stock to the Monetary Trust Company, and upon the 20th day of December, 1906, the date of the sale of said stock by said trust company to your petitioner, and at the present time is, to the best of your petitioner's knowledge and belief as set forth in a summary, marked schedule A for identification, and hereto attached and made a part of this petition. [72]

4. That your petitioner, on information and belief, further *allege* that his sole solicitor of record

and only counsel at the trial of the above-entitled suit, William H. H. Hart, Esq., could have testified of his own knowledge of the truth of the foregoing facts, and as your petitioner is informed and believes, and therefore alleges, would have so testified, except for the rule of court aforesaid, and his said solicitor's waiver of his right to testify in said cause was without knowledge on the part of your petitioner of the materiality and relevancy of the foregoing facts as going to disprove material allegations of actual fraud contained in complainants' bill of complaint, and that if the trial of this suit is reopened for the taking of further testimony, the said William H. H. Hart, Esq., will appear and so testify affirmatively; that since the decision in the above-entitled cause and by *reason the* large beneficial interest which said Monetary Trust Company receives in the stock of the Point Richmond Canal & Land Company by the rescission of the sale of the aforesaid 1175 shares of the said company, and by reason of the fact that he is a beneficiary of said rescission, and always has been and now is the general counsel of said Monetary Trust Company, the said William H. H. Hart, Esq., has voluntarily resigned as solicitor and counsel for your petitioner and a substitution of solicitors has been made of record in the above-entitled suit; and that by reason thereof the said William H. H. Hart, Esq., upon a rehearing thereof will not be disqualified as a witness on behalf of your petitioner by reason of the rule of court aforesaid.

5. That only since the trial, argument and decision in the above-entitled suit has your petitioner



been advised that the proof of the foregoing facts would establish an estoppel *in pais* and prevent the complainant from obtaining any relief in said suit on behalf of the Monetary Trust Company by way of rescission of said [73] sale of said 1175 shares of stock or otherwise, and that in the interest of a full and complete defense of said suit, your petitioner's answer to complainants' bill of complaint on file herein should be amended to contain proper allegations setting up the necessary and foregoing facts to establish such an estoppel *in pais*; and your petitioner is informed and believes and, therefore, alleges that the record of the former trial is greatly deficient, if not entirely wanting, in the proof of any of the foregoing facts which would operate to establish an estoppel *in pais* against a suit by the Monetary Trust Company to have a rescission decreed of the sale of said 1175 shares of stock as aforesaid, and that the reason therefor is because of the disqualification of the said William H. H. Hart to testify on behalf of your petitioner at the former hearing arising out of the rule of court aforesaid, and because of accident and surprise which ordinary prudence on the part of your petitioner could not have guarded against.

6. That since the trial, argument and decision in the above-entitled suit, your petitioner has found one of the original duplicate agreements entered into on the 28th day of March, 1905, between the Point Richmond Canal & Land Company aforesaid and your petitioner relating to the original purchase of the aforesaid ten thousand dollars' worth of bonds of the

Point Richmond Canal & Land Company; that said contract was lost and its whereabouts was entirely unknown to your petitioner or to any officer or agent of said land company at the time of the former trial of this action; that said contract was and is material to the proper defense of this suit by your petitioner because it opposes and rebuts the claim of the complainants and the testimony of the witness, Henry B. Mayo, to the effect that your petitioner's contract to buy said bonds was with the Monetary [74] Trust Company and involved an agreement on the part of your petitioner that he would carry at his own cost and expense the interest of the Monetary Trust Company in said 1175 shares of the Point Richmond Canal & Land Company stock; that said contract contains no such agreement and was known by the witness Mayo to contain no such agreement as the same was executed in the name of the Point Richmond Canal & Land Company by Fred Rechert, President, and H. B. Mayo, Secretary; that a true and correct copy of said contract, marked Schedule B for Identification is hereto attached and made a part of this petition.

7. That since the trial, argument and decision of the above-entitled suit your petitioner has found two bank or pass-books issued by the Central Trust Company of California to the Point Richmond Canal and Land Company, one containing the entries of moneys deposited from May, 1905, to February, 1906, and the other containing entries of deposits subsequent to November, 1906, and for the years 1907 and 1908; that the book containing entries of deposits subse-

quent to November, 1906, shows that more than Fifty Thousand Dollars had been deposited in the interval above mentioned to the credit of said Point Richmond Canal & Land Company; that said bank-books are material and relevant evidence on behalf of your petitioner to show in connection with his testimony that he solely and alone contributed a large sum of money to the development of the properties of the Point Richmond Canal & Land Company after his purchase of said eleven hundred seventy-five shares of stock from the Monetary Trust Company, and that he contributed the same in reliance upon his legal ownership of said stock and that his purchase thereof was a *bona fide* transaction: That said bank-books were lost and their whereabouts were entirely unknown to your petitioner and to the officers and agents of the Point Richmond Canal & Land Company at the time of the trial of this action; and that neither the aforesaid contract [75] mentioned in paragraph 6 hereof or said *book books* could have been found or produced at the time of the trial with reasonable diligence on the part of your petitioner, or any officer or agent of said Point Richmond Canal & Land Company.

WHEREFORE your petitioner prays that a rehearing may be granted herein with leave to your petitioner to amend his answer to the complainants' bill of complaint on file herein, and with leave to take such additional testimony on the matters heretofore referred to as the Court may adjudge and decree to be proper, and that the Court shall fix a time within which such testimony may be taken on

the part of your petitioner, and such further time as may be proper to opposing parties to take evidence to rebut the same.

And your petitioner will ever so pray.

HENRY C. CUTTING,

Petitioner.

JACOB M. BLAKE,

Solicitor for Petitioner. [76]

### SCHEDULE A.

Name.	No. Shares.	Beneficial Owner So Far as Known.
H. B. Mayo	605	H. B. Mayo
W. J. Morgan	65	W. J. Morgan
H. W. Wernse	155	H. W. Wernse
Albert Betz	55	Albert Betz
H. C. Cutting	125	H. C. Cutting
F. A. Woodward	5	H. A. Woodward
H. W. Wernse, Trustee	350	H. W. Wernse and W. H. H. Hart
Total	1360	

The foregoing being the state of the ownership of the Monetary Trust Company stock on March 27, 1905.

Name.	No. Shares.	Beneficial Owner So Far as Known.
H. B. Mayo	605	H. B. Mayo
W. J. Morgan	65	W. J. Morgan
H. W. Wernse	155	H. W. Wernse
Albert Betz	55	Albert Betz
H. C. Cutting	753	H. C. Cutting
W. H. H. Hart	10	W. H. H. Hart
F. A. Woodward	5	F. A. Woodward
H. W. Wernse, Trustee	350	H. W. Wernse (175) W. H. H. Hart (175)
	1998	



The foregoing being the state of the ownership of the Monetary Trust Company stock on December 20, 1915.

The present state of the stock ownership of the Monetary Trust Company is that of December 20, 1905, except that since that time Three Hundred Shares has been issued to W. H. H. Hart. [77]

#### SCHEDULE B.

THIS AGREEMENT made and entered into, in duplicate, this 28th day of March, 1905, by and between the Point Richmond Canal and Land Company, a corporation, duly organized, created and existing under the laws of the State of California with its principal place of business in the city and county of San Francisco and State aforesaid as the party of the first part, and H. C. Cutting of the same place as the party of the second part,

#### WITNESSETH:

That for and in consideration of the sum of one dollar (\$1.00) each to the other in hand paid, the receipt of which is hereby acknowledged, it is hereby agreed as follows, to wit:

First. Said party of the first part hereby agrees to sell and deliver to the said party of the second part, Thirteen Thousand Five Hundred Dollars (\$13,500), par value of the first mortgage bonds of the said party of the first part at the rate of seventy-five cents (75¢) on the Dollar (\$1.00) and said party of the first part FURTHER AGREES that it will on fifteen (15) days notice after June 1st, 1905, at the option of said party of the second part, transfer

and convey to him in payment for said bonds any then unsold lots or parcels of real estate at Point Richmond, belonging to said party of the first part excepting, however, therefrom the lots in Blocks A and B on the map of this company's property at said Point Richmond at the price provided in the mortgage for the release of said lots and to accept said bonds in payment therefor as provided in said mortgage given to secure said bonds.

Second. Said party of the second part hereby agrees to purchase said bonds upon the terms and conditions above specified and to pay therefor in sums and at times designated by the board of directors as may be necessary for the uses and [78] purposes of the company.

Third. Each of the parties hereto hereby *agree* to execute all papers, documents or deeds that may be necessary to carry out the provisions of this contract.

IN WITNESS WHEREOF, the said party of the first part has caused this agreement to be signed and executed by its officers duly authorized so to do by the board of directors of said company and to annex the seal of said company hereto and the said party of the second part has set his hand and seal

the day and year first above written.

POINT RICHMOND CANAL AND LAND  
COMPANY.

By (Signed) FRED REICHERT,  
President.

By (Signed) H. B. MAYO,  
Secretary.

(Signed) H. C. CUTTING, (Seal.)

[Point Richmond Canal and Land Co.—Seal.]

[79]

**Affidavit [of Wm. H. H. Hart] in Support of Petition  
for Rehearing.**

William H. H. Hart, being first duly sworn on oath  
deposes and says:

That he is by profession an attorney at law, and  
has been such for more than forty-five years last  
past; that he drew the articles of incorporation of the  
defendant, Monetary Trust Company, and has been  
its general counsel ever since, and as such was famil-  
iar with the business of the corporation so far as it  
has conducted a business, and with the executive  
committee of said corporation; defendant in the year  
1906 consisted of H. C. Cutting, president of the cor-  
poration; H. W. Wernse, cashier and trust officer  
of the corporation, and this affiant, said committee  
consisting of three, and the by-laws of said company  
provided as follows:

ARTICLE Xa.

Executive Committee.

1st. For the purpose of facilitating the conduct-  
ing of the business of this company, there shall be

appointed by the board of directors an executive committee of three persons.

2d. The president and chief counsel of the company shall [81] constitute two of said committee, and the board of directors shall select the third member of said committee from their number, or may select such other person as may be deemed for the best interests of the company.

3d. Said committee shall have full charge of and shall conduct and carry on the business of the company, and report its actions to the board of directors at the meeting of the board held next thereafter.

That in the months of August or September, 1906, upon a conference with the executive committee (consisting of H. C. Cutting, H. W. Wernse, and myself) and W. J. Morgan, and in view of the statement by Mr. Cutting that if the Monetary Trust Company expected to retain its shares in the Point Richmond Canal & Land Company then amounting to 1175 shares, that they must either buy their share of the bonds remaining unsold, or the Point Richmond Canal & Land Company would levy an assessment, and thereupon the Monetary Trust Company would have to pay its assessment on its 1175 shares; that he, Mr Cutting, had purchased Mr. Lewis's stock at \$1.00 a share, and purchased stock from Mr. Reichert, and that he was willing to pay the Monetary Trust Company \$1.00 per share for the 1175 shares, which was something in excess of the money which had been expended by the trust company on account of the Point Richmond Canal & Land Company, and thereupon H. W. Wernse, cashier and



trust officer, and this affiant, constituting a majority of the executive committee, *thereupon the executive committee* executed a writtten option to sell to said H. C. Cutting said 1175 shars at \$1.00 per share; and thereafter on December 20th, 1906, the matter was considered by the board of directors, and Mr. Cutting availed himself of the option to purchase the same. [82]

Up to this time this affiant had not been counsel for Mr. Cutting in any matter except a small case in Justice Court involving the fit of a coat.

Up to September or October, 1906, I had seen but very little of Mr. Cutting. My recollection is that Mr. Cutting paid very little attention to business matters in San Francisco before sometime in 1907.

My general connection with Mr. Cutting has been as attorney for three corporations in which he is interested,—the Point Richmond Canal & Land Company, Monetary Trust Company and the Richmond Dredge Company, and wherever he has personally appeared in those suits, and where I have appeared for the corporation, that is practically the only cases where I have been his personal counsel, with the exception of the time that the Richmond Dredge Company and the Point Richmond Canal & Land Company were represented by J. L. Taugher for a period of about eighteen months.

My recollection is that the first \$10,000 of bonds of the Point Richmond Canal & Land Company were purchased by Mr. Cutting from that company about the 28th day of March, 1905; my recollection is that I drew the contract for that transaction.

I was well aware at the beginning of the transaction in connection with the organization of the Point Richmond Canal & Land Company and the securing of the property mentioned in this case, that the land was swamp and overflowed land, and that its value depended almost entirely upon its improvement, and even if improved, it could only become marketable as the town of Richmond might grow. I knew nothing about the sale being questioned up to about the time of bringing the suit.

WM. H. H. HART,

Subscribed and sworn to before me this 11th day of October, A. D. 1915.

[Seal]

LOUISE BEARDEN,

Notary Public in and for the City and County of San Francisco, State of California. [83]

Due service of the within affidavit in support of petition for a rehearing and receipt of a copy is hereby acknowledged at San Francisco, California, this 13th day of October, 1915.

WM. H. H. HART,

Solicitors for Defendant, Monetary Trust Company.

JNO. B. CLAYBERG and

CLAYBERG & WHITMORE,

Solicitors for Complainants. [84]

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**Affidavit [of H. W. Wernse] in Support of Petition  
of Rehearing.**

H. W. Wernse, being first duly sworn on oath, deposes and says:

That he is, and ever since the year 1906, has been

a director and the secretary and treasurer of the Point Richmond Canal and Land Company, and as the secretary and treasurer of the said Point Richmond Canal and Land Company, is the legal and actual custodian of all of the papers, records, files and books of account of said canal and land company.

That during the great fire in the city of San Francisco, in April, 1906, most of the books, papers and records of the Point Richmond Canal and Land Company were destroyed; but there was saved therefrom a bank deposit book of the Central Trust Company and a contract between the Point Richmond Canal and Land Company and H. C. Cutting, dated March 28, 1905, *between the Point Richmond Canal and Land Company and H. C. Cutting*, which provided for the purchase, by H. Cutting, of \$13,500 of the first mortgage bonds of the Point Richmond Canal and Land Company at seventy-five cents on the dollar.

At the time of the fire I visited the office of the company at #79 New Montgomery Street, at six o'clock A. M. and put all the books that I could get in, into the safe of the [85] Monetary Trust Company, and those that would not go in were destroyed.

Six weeks after the fire, when the safe was drawn out of the basement of the Crossley Building on New Montgomery Street, and into the street, I had it opened and took all of the charred papers and put them in two hampers which were taken to the Crocker Safe Deposit Co. and I visited the safe deposit company on different occasions to get some of the papers and each time I would have to move a

number of boxes and bundles that had been thrown upon our hampers. That vaults were crowded with papers the same as ours, and from that time on, as I visited the safe deposit company, at intervals of two or three months, I was destroying, throwing away and laying aside, papers which I was sure would never be used, because the safe deposit company was always requesting us to reduce the space we were occupying. It would always take from two to three hours to get at these papers in the Crocker Safe Deposit vaults, on account of the amount of stuff that was there, and it was a very disagreeable job.

At the time of the trial of this case I made diligent search for all papers relating to the transactions of H. C. Cutting with the Point Richmond Canal and Land Company, but owing to the moving of our office four different times since 1906, some of the papers that we thought were not necessary were destroyed at each moving, and those that were thought to be of use were moved to the new address.

In making a search for some records of recent date, during the last month, I came across an envelope containing a pass-book and contract of the Point Richmond Canal and Land Company. The pass-book shows seventy-five hundred dollars (\$7,500) of money received from the sale of bonds, provided for in the contract, and was in use up to the time of the fire; and the contract was the contract above referred to as of date of March 28, 1905. This [86] contract and pass-book were found in a place that I would never have looked for any papers relating to



the Point Richmond Canal and Land Company. The other pass-book which was used after the fire was found in a box containing old bills and books which were considered of no use, and shows about forty-two thousand dollars (\$42,000) balance paid in on account of bonds of the Point Richmond Canal and Land Company, sold to H. C. Cutting since December 20, 1906.

On the former search for books, papers and records relating to the transactions between H. C. Cutting and the Point Richmond Canal and Land Company, and the Monetary Trust Company, I made a diligent search in all usual and ordinary places of deposit and custody for such papers and books, *and that* the above-mentioned contract and pass-books were not there and the same were not in such usual and ordinary places of deposit and custody, but were found by me since the trial of this action, as aforesaid, wholly by accident and by chance.

H. W. WERNSE.

Subscribed and sworn to before me this 11th day of October, A. D. 1915.

[Seal]

LOUISE BEARDEN,

Notary Public in and for the City and County of San Francisco, State of California.

Due service of the within affidavit in support of petition for a rehearing and receipt of a copy is hereby acknowledged at San Francisco, California,

this day 13th of October, 1915.

WM. H. H. HART,  
Solicitor for Defendants, Monetary Trust Company.  
JNO. B. CLAYBERG and  
CLAYBERG & WHITMORE,  
Solicitors for Complainants. [87]

**Notice of Lodgment of Statement.**

To Henry J. Woodward and Francis A. Woodward,  
complainants, and to Clayberg & Whitmore,  
your solicitors, and to Monetary Trust Com-  
pany, defendant, and to Wm. H. H. Hart, Esq.,  
your solicitor:

YOU AND EACH OF YOU WILL HEREBY  
PLEASE TAKE NOTICE: That the defendant  
above-named Henry C. Cutting, by his solicitor,  
Jacob M. Blake, has heretofore, and before the filing  
of a praecipe for transcript on appeal, lodged, and  
there is now lodged in the office of the clerk of the  
above-entitled court, Second Division, thereof, in the  
Postoffice Building, corner of Seventh and Mission  
streets, in the city and county of San Francisco,  
State of California, for your examination, a state-  
ment in condensed form of all of the evidence essen-  
tial to the decision of the questions to be presented  
upon the appeal from the decree heretofore entered  
in the above-entitled court and cause, on the 6th day  
of October, 1915, as required by Rule 74 (b) of the  
Rules of Practice for courts of equity of the United  
States.

Dated December 2, 1915.

JACOB M. BLAKE,  
Solicitor for Defendant Henry C. Cutting. [88]

Due service of the within notice of lodgment of statement and receipt of a copy thereof is hereby acknowledged.

San Francisco, California, this 4th day of December, 1915.

JNO B. CLAYBERG,

CLAYBERG & WHITMORE,

Solicitors for Appellees, Henry J. Woodward and Francis A. Woodward.

WM. H. H. HART, (R. L)

Solicitor for Appellee, Monetary Trust Company.

[89]

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**Notice of Time for Settling Objections to the Transcript on Appeal.**

To Henry J. Woodward, and Francis A. Woodward, complainants above named, and to John B. Clayberg and Clayberg & Whitmore, your solicitors; and to the Monetary Trust Company, above-named defendant, and to William H. H. Hart, your solicitor: You and each of you hereby please take notice that the undersigned solicitor for the defendant, Henry C. Cutting, will on Saturday, the 18th day of December, 1915, at the hour of 9:30 o'clock A. M. of said day, appear in the above-entitled cause before the Honorable William C. Van Fleet, a Judge of the above-entitled court, at his chambers in the Postoffice Building at the corner of 7th and Mission Streets, in the city and county of San Francisco, State of California, and request said Judge to settle all objections to the general contents of the record and of the state-

ment of the evidence, prepared on appeal in the above-entitled cause.

Dated San Francisco, California, December 14th, 1915.

JACOB M. BLAKE,

Solicitor for the Defendant Henry C. Cutting.

Due service of the within notice of time for settling objections to the transcript on appeal, and a receipt of a copy thereof, is hereby admitted at San Francisco, Cal., this 14th day of December, 1915, and it is hereby stipulated that the within Notice and admission of service may be made a part of the transcript on appeal in the above-entitled suit.

JNO. B. CLAYBERG,

CLAYBERG & WHITMORE,

Solicitors for Complainants.

WM. H. H. HART,

Solicitor for the Monetary Trust Co. [90]

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### **Statement of Evidence.**

BE IT REMEMBERED, that the above-entitled suit came on for trial in the District Court of the United States, for the Northern District of California, Second Division, before the Honorable William C. Van Fleet, Judge thereof, on Wednesday, the 18th day of November, 1914, and said trial proceeded from day to day until Saturday, the 24th day of November, 1914, during which time testimony was introduced upon behalf of the respective parties, and that following is a complete, true and correct summary of all the testimony of the different witnesses reduced to narrative form, and true and correct cop-



ies of all the exhibits introduced, identified and marked as such during said trial, on behalf of the respective parties to said trial. [91\*—1†]

**[Proceedings Had November 18, 1914.]**

Wednesday, November 18, 1914.

For the Plaintiffs, WELLES WHITMORE, Esq.

For the Defendants, W. H. H. HART, Esq.

Mr. HART.—I think this trial could be shortened very much by a statement being made and certain admissions made.

If your Honor please, the real property involved directly, you might say, in this case, consists of 406 acres of tide and marsh land in the city of Richmond. Mr. Fred Reichart, the gentleman mentioned in the pleadings, obtained a contract from the owners of the property, Mr. Mintzer and Mrs. Tuxberry—

It is a swamp land, tide land, inside the bight of the San Pablo Ranch now in the city of Richmond. Mr. Reichart arranged the proposition by saying that he would organize a corporation to take over the land and dredge it and improve it and fill it in. For that purpose he agreed to issue \$400,000 of bonds. \$336,000 of these bonds were to go to Mintzer and the Tuxberrys to pay for the title, no cash being paid; \$64,000 of the bonds were to be utilized so far as possible, for the purpose of reclaiming the land and putting it in a condition for sale and for occupation. Mr. Reichart then organized the Point Richmond Canal & Land Company and transferred that contract and the deeds were afterwards made to that

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\*Page-number appearing at foot of page of original certified Record.

†Original page-number appearing at foot of page of Statement of Evidence as same appears in Certified Transcript of Record.

corporation and it issued the \$400,000 of bonds; \$336,000 was delivered to Mr. Mintzer and the \$64,000 remained in the treasury of the company. Mr. Reichart made arrangements with the Monetary Trust Company, which was incorporated by Mr. Mayo and a man by the name of Von Wagner, who came here to the city [92—2] as a promoter and proposed to enter into the business of floating Japanese loans during the Russian and Japanese war, and this Monetary Trust Company was organized and the plaintiffs in this case took, we believe, about 500 shares of that stock and paid in \$5,000. Then the company entered into a *quasi* contract—

The COURT.—You say the plaintiffs here took that?

Mr. HART.—I mean the defendants. The Monetary Trust Company entered into a *quasi* contract with the Point Richmond Canal & Land Company to take one-half of the stock of the corporation, that is, of the Point Richmond Canal & Land Company, and take the \$64,000 bonds and raise the money to go on with the work of reclaiming this land. Then Mr. Cutting came into the matter and bought, I think, \$11,000, or a fraction over—we will have to go to the testimony for the exact number of bonds—for \$10,000 in money. Mr. Reichart had entered into a secret arrangement with Mr. Mintzer that he was to have a part or about \$75,000 of the \$336,000 in bonds. This only comes incidentally into this case for the purpose of showing the value of the property as it was then looked upon; simply an incident. The Monetary Trust Company then had with the excep-

tion of the shares going to qualify the directors of the Point Richmond Canal & Land Company, one-half of the stock, and the other one-half belonged to Mr. Reichart. Now, later on, certain moneys were to be furnished by Mr. Reichart and he was to receive back one-quarter of the stock, so that there was—

The COURT.—From whom?

Mr. HART.—The Monetary Trust Company through Mr. Lewis, who was the manager of the Miller & Lux estate; but that fell through; but, nevertheless, Mr. Reichart got the stock. [93—3]

The COURT.—I don't understand now what company you are speaking of.

Mr. HART.—I am speaking of the Point Richmond Canal & Land Company. First Reichart had half of it.

The COURT.—He turned half over to the Monetary Trust Company?

Mr. HART.—He got one-half from the Monetary Trust Company in his arrangement with Mr. Lewis in order to raise the money to take the \$64,000 of bonds, but that fell through, but he got the stock all the same. Then Mr. Cutting came into the matter and then the property had to be improved and the question was whether the Monetary Trust Company would put up its share of the money to improve the property or whether it would be assessed; and we claim that the directors of the Monetary Trust Company had no money to put up, they would not put it up if they had it, as the land was considered of little value and already mortgaged for \$400,000, which had

to be paid before any profits could be obtained; so the directors determined to sell this stock at \$1.00 a share, at the same price that outside stock was selling at. Now, since that time that land has become valuable; it is probably worth \$500,000 over and above the bonds; the bonds have not been paid off, or they mature on the 1st of next January, in about six weeks. Now, it is assumed by these plaintiffs that because the property now is worth \$500,000 more than it was then, that that 1175 shares should come back into the Monetary Trust Company. In the meantime Mr. Cutting has gone to work and spent upwards of \$150,000 on the property, improving the same, and on account of the protection of the inner harbor of Richmond, which is alongside a part of this land, it has become valuable.

The COURT.—How did he ever get title to this eleven hundred and some odd shares? [94—4]

Mr. HART.—It was transferred to him for \$1,175. He paid for it by his check and this check was cashed through the bank. The company got the check and got the money. We admit he afterwards borrowed the money from the Monetary Trust Company. It does not look fishy to me, because in the first place the company had the money to loan and he was willing to pay the interest that they had charged for the loan. That is the situation. If your Honor should say under the law that he is not entitled to it, he is not; but that is a question of proof. We claim that the money that he paid for it was all it was worth at the time. That is really the main question in the whole case,—that is about all there is to this case.



If your Honor holds it was worth a great deal more money and we did not pay a reasonable value for it, and that the ratification of the stockholders was not sufficient, then the stock has got to go back. But, on the other hand, if it was not, we claim that plaintiffs should be nonsuited,—that is, recover nothing.  
[95—5]

#### AFTERNOON SESSION.

Mr. HART.—If your Honor please, in this statement, I do not think it is very clear on one point. Has your Honor a copy of it?

The COURT.—No.

Mr. HART.—I stated this: “The plaintiffs in this case took, I believe, about 500 shares of that stock and paid in \$5,000. Then the company entered into a *quasi* contract”—

“The COURT.—You say the plaintiffs here took that stock?

Mr. HART.—I mean the defendants.”

Now, I think that the testimony ought to be gone into a little bit to show how many shares the plaintiffs took and how many the defendants took. I I don't know myself. Plaintiffs claim to have bought some stock. If your Honor would allow us to explain a little bit about that, it will have to come through the testimony, because I don't remember how that was. It may be that the plaintiffs took 500 shares and the defendants, too. I am not sure on that subject, but that we will have explained in the testimony. With that exception, I believe this statement is practically correct. If I see any other point, I shall call it to your Honor's attention.

Mr. WHITMORE.—If your Honor please, the statement made by General Hart seems to have eliminated quite a number of questions that we would probably have gone into. I wish them to produce that check the first thing. Have you the books of the company there? [96—6]

They will be here in two or three minutes. In fact, I think they are coming now.

**[Testimony of Albert Betz, for Plaintiffs.]**

ALBERT BETZ, called for the plaintiffs, and sworn, testified as follows:

I am secretary of the Monetary Trust Company and have all the books of the company with me; I have the minute-book, the book of the By-laws, the stock certificate book, the transfer journal, and the stock-book. These books have all been through the fire and, as a consequence, they are in this shape.

Thereupon, the following proceedings were had:

Mr. WHITMORE.—If your Honor please, I would offer all these books in evidence, with the understanding that we can read such portions of them into the evidence as we may desire.

The COURT.—Just put in the book and then you can read such parts into the record as you desire.

Mr. WHITMORE.—Q. Have you also the other books of the company showing the business transactions of the company?

A. These are the only books that I have.

Q. Do you know whether there are, or have you ever had in your possession, any books showing the business transacted by the company?

(Testimony of Albert Betz.)

A. Not further than what we have here, that I know of.

Q. Do you know of any other books?

A. I know of no others.

Q. Showing the transactions of the company?

A. No, I don't know of any others.

The COURT.—Q. Where did you keep a record of the business transactions of the company?

A. We have always kept them in the office of the company. [97—7]

The COURT.—Q. Where did you keep them, in what books?

A. These are the only books I have ever had.

The WITNESS.—The cashier may have done business of which I know nothing.

On cross-examination, the witness testified as follows:

I reside at present in Napa, where I have lived about three years. I have simply acted as secretary of the corporation, attending the meetings and keeping the minutes of the meetings. As to the financial transactions and business of the company, other than as stated, I had nothing to do.

Mr. HART.—Do you want to ask him any questions, Mr. Whitmore, about whether he was present at any particular meeting? You claim he was not. That is up to you, it seems to me, to go into that, if you want to at this time. It would be the chronological way in these proceedings.

The WITNESS.—The minutes will show the meetings I was not [98—8] present at. I pre-

(Testimony of Albert Betz.)

pared these minutes to be entered in the books. They were entered at or about the time they occurred, and as far as I know, the minutes are correct. The record shows that the minutes were approved wherever they have been approved. I have been a secretary of corporations for quite a number of years, at different times, and I understand the keeping of minutes of meetings and the by-laws and so forth. To the best of my knowledge these minutes are correct as stated in the books. As far as I know, there were no other minutes other than these on the books that were not entered. There were several meetings that I did not attend; I could not tell just how many. [99—8¾] The minutes of the meetings that I did not attend were written up by a secretary *pro tem* appointed at the time. So far as I know all of the minutes of all of the meetings at which I was not present were afterwards written up and are in the books. A good many of the minutes are typewritten; I did quite a number of the typewritten ones. I don't know as I would know my own typewriting, if I saw it. The minutes extend over a period of ten or twelve years.

Mr. WHITMORE.—I will call your Honor's attention to the minutes of December 20, 1906, which are typewritten and pasted in on page 33 of the minute-book. I will read them in evidence. This is one that we will offer in evidence, anyway, your Honor. "Meeting of the directors of the Monetary Trust Company held this 20th day of Deecember, 1906, at 12 o'clock noon.



(Testimony of Albert Betz.)

Present: H. C. Cutting, W. J. Morgan, H. W. Werne.

Absent: Albert Betz, H. B. Mayo.

On motion of H. W. Wernse and seconded by W. J. Morgan, and carried unanimously, H. C. Cutting was elected President. W. J. Morgan, Vice-president. Albert Betz, Secretary. H. W. Wernse, Cashier and Trust Officer.

Mr. H. W. Wernse presented the check of H. C. Cutting for \$1175, stating that Mr. Cutting desired to exercise his right under the option given him by the Monetary Trust Company, ratified and confirmed by the stockholders at their last meeting, to purchase 1175 shares of Point Richmond Canal and Land Co. stock held by the Monetary Trust Company at \$1.00 per share.

On motion of W. J. Morgan (under the advice of the Chief Counsel) and carried unanimously, the cashier was ordered to deliver to H. C. Cutting the certificate for 1175 shares of Point Richmond Canal & Land Company stock for \$1,175, as per [100—9] the option.

There being no further business, the meeting adjourned. Albert Betz, Secretary."

The WITNESS.—That was written by someone else for me. I was not present.

The COURT.—Q. How did you come to sign it as secretary, if you were not present?

A. I think you will find at the next meeting the minutes were approved. That is how I came to sign it.

(Testimony of Albert Betz.)

Mr. WHITMORE.—Q. I wish you would turn back and procure the minutes showing the authorization, the option and the ratification mentioned in these minutes of that date.

A. That is at the meeting of the stockholders held on November 10, 1906. I was present at that meeting.

The COURT.—Read the entire minutes of that meeting in evidence and let us see what they are.

A. (Reading): "Stockholders' meeting of the Monetary Trust Company, held November 10, 1906, at 10 A. M., pursuant to adjournment. Thirteen hundred seventy-eight (1378) shares, a majority of [101—10] the stock issued, being represented. Mr. Wernse nominated as directors Messrs. Cutting, Morgan, Wernse, Mayo and Betz. There being no further nominations the nominations were closed, and the secretary was instructed to cast the ballot for said persons as directors, and said persons were declared directors of this company for the following year or until their successors were elected. Mr. Wernse of the executive committee being the only member of said committee present, offered for ratification and approval, the following option given to H. C. Cutting; and upon motion of Mr. Wernse, seconded by Mr. Betz, approved by the following vote:

H. W. Wernse, representing 505 shares;	
W. J. Morgan,	65
Albert Betz	55
H. C. Cutting (H. W. Wernse proxy)	753

Being more than a majority of the shares issued.

(Testimony of Albert Betz.)

On motion of H. W. Wernse and seconded by Albert Betz, all actions of the board of directors and its officers since the last stockholders meeting, to date hereof, were unanimously ratified, approved and confirmed.

There being no further business, the stockholders meeting on motion duly made and seconded was adjourned. Albert Betz, Secretary."

The COURT.—Q. Where is that option that is referred to there?

A. That option, I don't know where that is now. That option was always in this book, but where it is at the present time, I am unable to say. [102—11]

Mr. WHITMORE.—Can you find in the previous records any reference to that option?

A. There is nothing further that I know of in regard to that.

Mr. WHITMORE.—Q. Now the meeting that you read, what is the date of this one here?

A. This one is November 10, 1906.

Q. You mean of the stockholders?

A. The stockholders, November 10, 1906.

Q. That appears on page 31 of the minute-book?

A. Page 32.

Q. Turn back to the meeting from which that was adjourned. It appears to have been adjourned meeting.

A. Well, this appears to be the meeting that was adjourned, held September 3, 1906.

Mr. WHITMORE.—Q. Just read the minutes of the meeting of September 3, 1906, as it appears at

(Testimony of Albert Betz.)

page 31 of the minute-book. [103—111½]

A. (Reading:) “Meeting of The Monetary Trust Company, held September 3d, 1906. Present, H. C. Cutting, W. B. Mayo, W. J. Morgan, Albert Betz.

Absent: F. W. Woodward.

It was moved by W. J. Morgan and seconded by Albert Betz, that room No. 404, 925 Golden Gate Avenue, be made the office of the Monetary Trust Company until the further order of the board of directors. Unanimously carried.

On motion of Albert Betz and seconded by W. J. Morgan, it was unanimously resolved, that:

Whereas the annual meeting of the Monetary Trust Company not having been held, therefore said Annual meeting is called for Saturday, September 29, 1906, at 12 M., at the office of said company, room 404, 925 Golden Gate Avenue, for the purpose of electing a board of directors, and taking into consideration whether or not the assets of the company be disposed of, what step shall be taken for the purpose of raising funds for carrying out the work in Richmond; and such other business as may properly come before the board, and that the secretary make the necessary publication.

It was moved, seconded and carried, that the secretary procure a seal in the words of the seal destroyed, and certain books and stationery as may be needed by the company.



(Testimony of Albert Betz.)

There being no further business, the meeting adjourned.

ALBERT BETZ,  
Secretary."

This is a directors' meeting.

The COURT.—You see the meeting they directed the secretary to call on that one of September 3d, is for the 29th of September. Is there no evidence of such a meeting?

A. Evidently the meeting did not take place and was adjourned. There is nothing there. [104—12]

The COURT.—Q. Whether a meeting took place or not, if a meeting has been called, there must be some minutes with reference to it because a minority can postpone a meeting but a quorum only can transact business.

The WITNESS.—Evidently there was no quorum present, and it went over.

The COURT.—That is a mere deduction of yours. That is not evidence.

WITNESS.—(Continuing.) I know nothing about this check of \$1,178.00 from Mr. Cutting. I never saw it to my knowledge.

[Testimony of H. C. Cutting, for Plaintiffs.]

H. C. CUTTING, called for the plaintiffs, and duly sworn, testified as follows:

Mr. WHITMORE.—Q. Mr. Cutting, have you that check with you for \$1,175 that was issued on the 20th of December, 1906, to the Monetary Trust Company?

A. No; when Mr. Mayo served me with that paper,

(Testimony of H. C. Cutting.)

I looked to see if I could find it, and I could not find any checks that were issued before I moved down into the Monadnock Building—

Q. You have not that check with you and cannot produce it?

A. No, I could not find it. [105—13]

**[Testimony of H. W. Wernse, for Plaintiffs.]**

H. W. WERNSE, called for plaintiffs, and duly sworn, testified as follows:

I am cashier and trust officer of the Monetary Trust Company. I have acted in that capacity since right after the organization, which was sometime before the earthquake and fire. Before the fire we had a stenographer that kept the books, but at my direction. Since that time the entries have been made by myself. Those books are down at 779 Monadnock Building. I can go down and get them right away.

(Thereupon the witness went and secured the books.)

(The witness identified the cash-book and journal of the Monetary Trust Company, whereupon the following proceedings were had:

Mr. WHITMORE.—I will offer them both in evidence, with the understanding we can read from any place we see fit in them; it may be all considered read, for that matter.

Mr. HART.—Yes.

Mr. WHITMORE.—Q. I hand you the cash-book and I wish you [106—14] would turn to the cash-

(Testimony of H. W. Wernse.)

book and show the payment by Mr. H. C. Cutting of \$1,175 for 1175 shares of the Monetary Trust Company stock, or the Point Richmond Canal & Land Company stock.

A. On page 54. (Reading:) "To H. C. Cutting account, 1175 shares Point Richmond Canal & Land Company stock \$1,175." The date is February 28, 1907. It does not show in here how it was paid; that is merely an entry in the book.

I received from Mr. Cutting a check for \$1,175 on the 20th of December, 1906, the date of the meeting of the company in which it is written in the minutes that I presented a check and stated that he desired to exercise his option to purchase the 1175 shares of stock. In the ordinary course of business. I would deposit it—I don't remember at this time what I did with it; it is a long time ago. I have not the bank book here.

A. The bank-book has been out of my possession for some time. I have been looking for it and I could not find it. I don't know whose possession it has been in. I did not cash that check myself. It would not be cashed—made out to the Monetary Trust Company, it would not be cashed; I do not believe any bank would cash it. They would take it for deposit.

A. It was not cashed—I did not cash it.

The COURT.—Q. What did you do with it? How did it get out of your possession? What did you do with it? Do you know what became of it? [107—15]

(Testimony of H. W. Wernse.)

A. I don't remember what was done unless it was deposited; that is what should have been done with it.

Q. That would be virtually cashing it, so far as the company would be concerned; they would get credit at the bank for it.

A. Yes, they would get credit for it.

Q. Where does that appear?

A. The only entry appears right here.

Q. That is a different thing. You very evidently entered that check as cash, didn't you?     A. Yes.

Q. But you did not cash the check?

A. Money received—what we call “money received” and “cash disbursed.” That is the way we kept the books.

Q. And checks are entered in that respect as cash, I suppose?     A. Yes.

Mr. WHITMORE,—Q. This check, the minutes of the company show was received on the 20th day of December, 1906. Now, what did you do with it at that time, do you remember?

A. I don't remember; I simply presented it at the meeting as the minutes show.

The COURT.—Q. What is the date of the entry here?

A. Of February 28, 1907.

The COURT.—Q. Where would that be all that time, that item?

A. I don't remember why that item was put in there in February instead of in December.

I have not in my possession, among the books and



(Testimony of H. W. Wernse.)

papers of the company, the note of H. C. Cutting for \$1,175.

The books show that the note was paid and a new note issued. I took that note June 1, 1907; I took the first note June 1, 1907. That note is for \$1,175. On August 27th there was a payment of \$125 on account of the note and \$16.90 account of the note for the purpose of meeting our license tax of \$100 and advertisements of notice in the Daily Journal of Commerce. [108—16]

I have been during all this time associated with Mr. Cutting in or around the office. The Monetary Trust Company since April 18, 1906, took a trusteeship on some bonds from O. A. Ellis which was called the Independent Nevada Milling Syndicate. That was only fees paid in, which were \$50.00. There were expenses that were paid.

The COURT.—Q. Where are the papers representing that trust?

A. Those papers are down in the safe. I did not bring those papers up. I will bring the whole thing. That was in 1908, and the papers were put back with a lot of old files. The trust was cancelled.

The WITNESS.—(Continuing.) My account shows that Mr. Cutting has paid in on account of purchase of the stock of the Monetary Trust Company, \$1,175.

The COURT.—Q. What money has been paid in by Mr. Cutting for issue to him of the defendant company stock, the Monetary Trust Company, he is asking you?

(Testimony of H. W. Wernse.)

A. The only way we can find that out is by taking and drawing this off from the ledger. After the fire, we never resurrected the ledger, these books were the only books saved. That is the cash-book we had before the fire, but you have to go down here and take each entry where he paid it.

Mr. WHITMORE.—Q. Can you point to any entry where he paid anything. [109—17]

A. Yes, right here, \$300 on September 15th.

Q. For what?

A. September 15, 1904, stock subscription.

Q. Did he pay that money? A. Yes.

Q. Have you got a record in your bank account of bank-book of the payment of that money?

A. That was in the Germania National Bank in 1904 and destroyed. My bank-book was destroyed at the same time, in the Crossley Building. These records show they were made before the fire.

Q. Is there any other item of payment that you can find? A. On September 26, 1904, \$239.

Q. When these amounts were paid, what was done with them? Were they deposited in the bank?

A. They were deposited in the Germania National Bank.

Q. What was his subscription to stock originally?

A. I believe if you will let me have that book I can tell you from that—500 shares.

Q. \$5,000? A. \$5,000. [110—17½]

The COURT.—Q. Is that all he paid in?

A. No, I can read them. “November 30, 1904,

(Testimony of H. W. Wernse.)

\$175. March 27, 1905, \$150. April 22, 1905, \$50 and \$40. May 2, 1905, \$405, \$40, \$75, and \$2.25. June 7, 1905, \$265, June 16, \$5, and \$20. July 1, 1905, \$258.50. August 8, 1905, \$262.85. August 31, \$10.

The books don't mention what these are paid on account of.

The COURT.—Read these various entries and see what they show. You have been stating them as though they have been on account of the stock.

A. They are paid in on account of stock.

Q. You say it don't say that?

A. It does not in the cash-book; all the entries were carried out in that manner.

Q. How would it be he would be paying in \$40 and \$7 in separate payments on the same day, and then make payments in odd amounts like that \$262.85?

A. We used to have the bills and we would at the end of the month figure up what the bills were and Mr. Cutting would give us his check for the amount of the bills.

Q. Was Mr. Cutting running the whole thing?

A. His subscription of stock was there and we called on him for his payments.

Q. You had other subscriptions for stock, too, didn't you?

A. Mr. Mayo. He paid for his in the same way.

Q. Is that a usual way to receive payments for subscriptions of stock; just to take the amount the expenses call for?

A. The argument advanced at that time was, when there was anything to invest it in they would put up

(Testimony of H. W. Wernse.)

the balance of the money. [111—18]

Mr. WHITMORE.—Q. I want these items paid for the expenses of the office, these in 1905 that you have just been reading; take for instance the item of June 7, 1905.

Q. Of \$265?

Q. Yes.

A. The charge against that is Hartland Law, rent, \$135.

Q. It was rent of the office that was occupied by Mr. Cutting and in with the company had nominal offices, was it not?

A. Occupied by the Monetary Trust Company.

Q. How much of it was paid to you as secretary out of that payment?

A. The Monetary Trust Company rented these offices upstairs in the Crossley Building from Mr. Hartland Law.

The COURT.—Q. He asked you how much of that particular payment was paid to you as secretary.

A. I did not receive this payment as secretary.

Mr. WHITMORE.—Q. As the Cashier?

A. \$135 was the check drawn by me on the Germania National Bank for \$7.15 in favor of the Pacific States Telephone & Telegraph Company.

Q. That was for telephone service?

A. Yes. A check was drawn for \$40 in favor of M. C. Boyd, stenographer and bookkeeper.

Q. A stenographer in Mr. Cutting's office?

A. No, a stenographer in the Monetary Trust Company.



(Testimony of H. W. Wernse.)

Q. What business was the Monetary Trust Company doing in the month of June, 1905? Just show any business they transacted that month.

A. Well, the Monetary Trust Company was attempting to transact a lot of business at that time and at other times. One piece of business that I was trying to transact as cashier and trust officer was the purchase of two blocks of land in [112—19] the Richmond District for \$8,000 cash and some stock in the trust company.

Q. Anything in the minutes of that company employing you or authorizing the purchase of any such land?

A. Not in the minutes, but the directors of the company authorized me to try to get business.

Q. Where is that record?

A. I do not believe you will find it in the records, but I guess the directors all will admit that.

I received \$75 as cashier out of the payment of that \$265 and \$5 and \$20 by Mr. Cutting and Miss Boyd received \$40 as a stenographer, and the rent, \$135.

Q. And all this time this was Mr. Cutting's office as well as the Monetary Trust Company's office, was it not?

A. He did very little business that I could ever see.

Q. Mr. Wernse, you didn't answer the question.

A. He had a desk there, yes.

Q. It was his office?

A. He made it his office all that time. [113—  
[191½] I could not tell you whether the stenographer did any work for him. I suppose if he wanted to dic-

(Testimony of H. W. Wernse.)

tate a letter, she would take it. The stenographer wrote letters for the Monetary Trust Company. I have none of those letters or copies of them. They were in the Crossley Building and they were burned in the fire. These books were in the safe and they were pretty compact and they held; the minute-books were charred worse.

Before the fire, Mr. Morgan had offices with Mr. Cutting. Mr. Morgan paid half of the rent and whatever his telephone bill was. The rent increased as we went along. I see here on December, 1905, we paid \$160 a month, and Mr. Morgan paid at that time, \$88.60.

The COURT.—Q. Then Mr. Morgan really paid one-half of this item of \$135?

A. Not at that time; after he came in in July, 1905; he paid \$91.75 in July.

The COURT.—Q. That would be more than half?

A. I suppose he came in in June, because that was July, and I suppose we paid the rent for June.

Q It is not a matter of supposition. Your books ought to show what the figures are.

A. It shows only we received the cash, but it does not show definitely what was done with the \$91.75.

Q. Don't your books show what your monthly transactions were so that you can show exactly to a dollar or a cent what it went for, what it was received for? A. Yes.

Q. Isn't that the purpose of the books?

(Testimony of H. W. Wernse.)

A. Yes, but when we take in \$91.75 from Mr. Morgan, we didn't put down what it was taken for. It was half the expense.

Q. Then, how do you know what it was taken for, if the books do not show the transactions? Do you carry them in your head?

A. Not transactions in money, but we carry the transactions of why a man was in the office, occupying an office.

Mr. HART.—Q. In other words, that entry includes what he [114—20] owed up to that time for rent? A. Yes.

The COURT.—How do you know that includes what he owed? Perhaps that was only part of it, of what he owed. How can you tell from your books if that is the way they were kept?

A. Well, I have to confess, your Honor, that I am not a bookkeeper; I kept the cash, what I received and what I expended. These were all the books that were kept.

Q. Then really there was no way of telling from those books the amount that was really expended by the Monetary Trust Company, for the maintenance of offices and their incidentals, and what was bought from other sources?

A. Yes, they all show that here. The books show.

Q. You just stated you could not tell whether he owed more than \$91.75 or not?

A. I did not mean to say so. I meant to say that we collected from Mr. Morgan \$91.75; that was his

(Testimony of H. W. Wernse.)

half of what he should pay during the month.

The COURT.—Q. Where do your books show that the other half was or what the other expenditure was, or what the total was, to see whether it was half or not?

A. It shows here we paid out on July 3d to Hartland Law on account of rent \$135. Star Supply Company, \$1.50; Pacific States Telephone & Telegraph Company, \$7.83. To H. C. Cutting, \$91.75; \$91.75 was paid by Mr. Morgan, and \$91.75 by Mr. Cutting; Mr. Cutting gave his check for the total amount and we returned Mr. Cutting his \$91.75.

Q. Why?

A. Because that was one-half of the expenses. I see two items right here. Mr. Cutting paid \$258.50, and we returned to him \$91.75.

Q. Under your method of keeping books, why should he have paid in anything more than his half of the expenditures?

A. Mr. Morgan, I suppose, was not there at the time, and Mr. Cutting gave his check to pay these bills.

We have got Mr. Morgan credited up with \$91.75, Mr. Cutting with \$258.50, and the rent, \$135, and Miss Boyd, \$40; [115—21] and myself, \$75, and Mr. Cutting \$91.75.

Q. "Then you have a charge of having paid Cutting \$91.75." A. "Yes, that was it."

The COURT.—Q. Now, why, if Mr. Cutting was at that time owing, as your books indicate, a large



(Testimony of H. W. Wernse.)

amount still on his subscription for stock, was any money returned to him?

A. There was an agreement about how the expenses were to be carried on of that office, between the directors and myself, how I should do it.

Q. Where is there anything in your minutes that shows any such arrangement as that?

A. Nothing in the minutes that I can see to show it.

Q. Would not that indicate that this arrangement as to the offices was really a private transaction between Mr. Cutting and Mr. Morgan?

A. I would not say so, no. Mr. Morgan had the sanction of the rest of the directors to come in there and pay a part of the expenses. We expected at any time to do this business that General Hart spoke of.

Q. You are aware, aren't you, that the evidence of a sanction or other transaction of a board of directors should find a place in the minutes of their proceedings?

A. Lately I have, your Honor, but at this time I was not aware of that.

Mr. HART.—Q. When you say "this time" you mean the date of these entries?

A. I mean at this time, 1905.

Mr. WHITMORE.—Q. Now, take August, how much did Mr. Cutting—how much have you credited him with paying? A. \$262.85.

Q. And how much Mr. Morgan? A. \$91.40.

(Testimony of H. W. Wernse.)

Q. What payments were paid out during that month?

A. M. C. Boyd, stenographer, \$40; Hartland Law, on account of rent, \$135; Pacific States Telephone & Telegraph Company, [116—22] \$7.85; H. W. Wernse, \$75; Milton Heyneman, office supplies, \$2.05; Le Count Brothers, \$1.50; H. C. Cutting, \$91.40; Mercantile Guide Directory, \$3.25; postage, 50 cents; Herring, Hall Safe Company, \$1.50.

Those were all office expenses, including supplies and rent. At that time, in August, 1905, Mr. Morgan had part of the office and Mr. Cutting had an office in the rear, with the understanding he was to pay half of the rent of the office and telephone and incidental expenses,—towels, supplies.

The records do not show any business transacted by the Monetary Trust Company in the month of August.

In the month of September, Mr. Cutting paid \$260 and Mr. Morgan \$92.75. Those items were paid to cover Hartland Law, on account of rent, \$135; M. C. Boyd, \$40; Pacific States Telephone & Telegraph Company, \$9; H. W. Wernse, \$75; Star Towel Supply Company, \$1.50; Moise-Klinkner Company, 75 cents; H. C. Cutting, \$92.75. That was for the half that Mr. Morgan paid on account of the expenses.

Q. Well, then, if Mr. Morgan paid in \$92.75 and you paid that amount, \$92.75, back to Mr. Cutting, he got all that Mr. Morgan paid in, didn't he?

A. It was returned to him. The entry could have

(Testimony of H. W. Wernse.)

been changed. The entry could have read just the actual amount that we should have credited Mr. Cutting, but instead of that we got his check for \$260, and returned him the \$92.75 when Mr. Morgan paid it in.

Q. But you have credited Mr. Morgan with paying \$92.75, so the receipt that you had was \$260 and \$92.75 for the month of September, 1905, and then you paid back the amount that Mr. Morgan paid to the company to Mr. Cutting, did you not? [117—23]

A. Returned it to Mr. Cutting; Mr. Cutting advanced it. We charged Mr. Cutting with having received it.

Q. Where do you charge him with receiving it?

A. H. C. Cutting, \$92.75.

The COURT.—Q. That isn't half of \$260?

A. No, it is not. It is half of the expenses which he was to pay.

Q. He did not pay half of all the expenses?

A. Not all, no. He was to pay nothing to be paid to me. I was paid by the Monetary Trust Company \$75. He was to pay half the rent and the 'phone bill—usually on the bill it showed what the long distance was.

I did nothing for Mr. Morgan. At that time I was not doing any business for Mr. Cutting. At that time Mr. Cutting was mostly in Tonopah, between Tonopah and San Francisco—engaged in mining there, and he was very seldom here.

The WITNESS.—(Continuing.) I have no item

(Testimony of H. W. Wernse.)

for December, 1906, and nothing for the November previous. I have for October previous, 1906, "Received of Pacific Underwriting & Trust Company, \$6.50 and \$4.50." \$6.50 was paid out to the "Daily Journal of Commerce" for notice of annual stockholders' meeting, and the \$4.50 was paid out to Damiah & Steckler, stationery, for letter-heads for the Monetary Trust Company. For September, I have, "Received from H. C. Cutting \$75. Paid to H. W. Wernse \$75." Didn't charge any rent in these months. After the fire we were up on Golden Gate Avenue.

In August of 1906. I have the entry, "Received from Pacific Underwriting & Trust Company, \$20; from H. C. Cutting, \$75;" and paid out to C. F. Curry, on license tax, \$20; H. W. Wernse, \$75.

In July, "Received from H. C. Cutting \$75; paid out to H. W. Wernse \$75." That was for me as cashier. [118—24]

The books do not show any business from July to December, inclusive. I know only myself what I did. I did not put it down in the book. I have no books that show.

The books do not show any business transacted the first half of the year, from January to June, inclusive.

Mr. WHITMORE.—Q. Now, turn to the books that show the transactions of a trust that the company holds of \$1093, I think it is.

A. That was January 20, 1908. The item shown by our books is "To cash balance, Pacific Under-



(Testimony of H. W. Wernse.)

writing & Trust Company, Brauer settlement, \$1,093." The books show that the company holds that money in trust for the Pacific Underwriting & Trust Company. We have it loaned out, to H. C. Cutting on his note at 8 per cent. The company now holds one note of H. C. Cutting for \$1,000 and one note for \$1,093.

The COURT.—When did you say that the loan of this \$1,175 was made to Cutting and they received the note?

Mr. WHITMORE.—They received the check as shown by the minutes on the 20th of December, 1906.

The COURT.—When was the loan of that amount to Cutting?

The WITNESS.—June 1, 1907.

Mr. WHITMORE.—The entry of the receipt of the money is February 28, 1907? A. Yes.

Q. Do your books show what has become of that trust fund now more than a loan—does it show that that is loaned, and if so where?

A. Yes, it says, "By loan to H. C. Cutting, note 8 per cent, \$1,093."

Q. That does not refer to the trust fund; it is only the same amount; is that it?

A. It is the same amount and the same date.

Immediately on getting that \$1,593 it was loaned to Cutting. [119—25]

The WITNESS.—(Continuing.) In September, 1904, we received \$539 from Mr. Cutting on his subscription. With that we paid the rent, Miss Boyd, postage, telegrams; office supplies and advertise-

(Testimony of H. W. Wernse.)

ments and Point Richmond Canal & Land Company, on account of surveyor, surveying the land at Richmond. That is the Point Richmond Canal & Land Company's land. The Monetary Trust Company paid some of the expenses.

The way they came to be paying expenses on the land of another corporation was that the Canal Company had no money and the surveyor surveyed the land at the instance of the Company, the Canal Company. I suppose it was part of their business to pay the expense of the Canal Company.

If your Honor please, the board would meet—Mr. Mayo would come down in the Crossley Building; General Hart would come down from the Parrott Building; Mr. Morgan was there and myself,—and present a bill and say, “The surveyor wants his money; better pay it; draw a check and pay it.” Mr. Betz, who was up in the Parrott Building,—the secretary,—did not come down, and we did not have a regular meeting; and I was authorized to draw a check and pay it. I don't know how I can show it any other way than how the money went. I do not know of any minutes of the Monetary Trust Company, either stockholders or directors that this one bill should be paid. I do not believe the minutes ever provided for us paying bills. The item that I have read that I said was a cash payment by Mr. Cutting, was really applied to the payment of the expenses of the corporation. It went to pay all these expenses and then we got a big desk there from

(Testimony of H. W. Wernse.)

Fuller for the office.

The COURT.—The question he asked was whether there are any entries in your books showing the payment of anything on account of his subscription to stock, other than payments made to meet office expenses. [120—26]

A. Well, we had on the 15th day of December, received a check for \$300 and on the 17th of December, we had only paid out \$125 on account of rent, \$40 to Miss Boyd, postage, \$1.00, telegrams, \$1.00, postage, 50 cents, exchange, 15 cents, \$48 to New York exchange, to McCormick. They are all the items paid out up to that time.

It looks like I missed my own salary that month. I got it later. I do not believe I missed putting it down.

No, there is no entry in the books showing an authorization through the board of directors to make any loans to Mr. Cutting, either of this \$1,175 or the trust fund of \$1,093. Our books do not show any transaction, any business by the Monetary Trust Company during the year 1907. In 1908 they show this one transaction; that is all,—the Brauer transaction. Since that time, in June, 1909, the books of the Monetary Trust Company show we received from the Independent Milling Syndicate \$50.00. That was paid to myself. The real transaction was, we received the money from the Independent Nevada Milling Syndicate, as a fee to act as trustee on some bonds that had been issued; that was not myself individually; it was the Trust Company; it was not paid to

(Testimony of H. W. Wernse.)

me individually; it was paid to the Monetary Trust Company, it was paid out to me as salary. It was not much to grab onto, your Honor, for a month's work.

(An adjournment was here taken until to-morrow, Thursday, November 19th, 1914, at 10 A. M.)  
[121—27—28]

Thursday, November 19th, 1914.

H. W. WERNSE, direct examination (resumed).

Mr. WHITMORE.—Mr. Wernse, have you got the notes given by Mr. Cutting, the defendant, to the Monetary Trust Company?

A. Yes, I have them there.

I have not the note for \$1,175; part was paid off and this was a new note given; the book shows it. The new note was given for \$1,000, the balance. The books show that \$175 and interest was paid. This is the new note. The other note was surrendered at the time. This is the note given for the balance then claimed to be due upon that original note for \$1,000. There has not been any renewal of this note or any note given in place of it.

Mr. WHITMORE.—I would like to offer this in evidence, if your Honor please. This is dated August 27, 1907. I will read it. (Reading:)

“San Francisco, August 27, 1907.

“\$1,000.

One year after date without grace I promise to pay the Monetary Trust Company or order the sum of one thousand dollars, payable only in gold coin of the Government of the United States, for value received, with interest thereon in like gold coin, at the



(Testimony of H. W. Wernse.)

rate of 8 per cent per year from date until paid.

H. C. CUTTING."

The COURT.—Q. If that note has been paid how does it come to be in your possession?

A. That note was never paid. The \$1,175 note was paid by paying off \$175 of the principal. [122—29]

Q. That doesn't pay a note. You mean that there was that much paid on it and a new note made. Has this never been paid?

A. This has never been paid.

The WITNESS.—We have collected interest on it.

Mr. WHITMORE.—I will also read this one—(addressing the witness): This note you hand me, dated January 21, 1908, signed "H. C. Cutting, for \$1,093, is the other note referred to?

A. Yes. That is for the amount of money the company holds a trust for. [123—30]

The COURT.—Q. Were both these notes signed by Mr. Cutting personally or by somebody in his behalf? A. H. C. Cutting personally.

Mr. WHITMORE.—I will read this:

" San Francisco, January 21, 1908.  
\$1,093.

One year after date without grace I promise to pay to the order of Monetary Trust Co., \$1,093 for value received with interest at 8 per cent per year from date until paid, both principal and interest payable only in United States gold coin.

H. C. CUTTING."

What is that down in the corner?

(Testimony of H. W. Wernse.)

A. That is just a note which I made there, on account of Pacific Underwriting & Trust Company trust—that is by own notation.

Mr. WHITMORE.—I will read that also: “Account Pac. Und. & T. Co.”

The COURT.—What is the date of that note?

Mr. WHITMORE.—It is dated January 21, 1908, payable one year after date.

The COURT.—No endorsements on it?

Mr. WHITMORE.—No endorsements whatever.

The COURT.—Q. Any interest been paid on that?

A. Yes, \$150.

Q. Does that cover the entire interest?

A. No, it does not.

Q. How much?

A. The balance due up to April 20th of this year was \$307.51.

Q. That remains unpaid?

A. That remains unpaid.

The COURT.—The note is outlawed. Any endorsements on the other notes?

Mr. WHITMORE.—Not on either of them.  
[124—31]

The COURT.—Don't you endorse payments of interest on a note?

A. I do it in the bank. It is not endorsed on the note.

Q. It is not endorsed on the note?

A. No, I have a memorandum on the note.

The WITNESS.—(Continuing.) Since the fire and earthquake, in 1906, The Monetary Trust Com-

(Testimony of H. W. Wernse.)

pany had a bank account; they opened a bank account sometime after the fire. I have the bank-books of the Central Trust Company with me. The account was opened on August 29, 1907. Before that, between April 18, 1906, and August, 1907, the Germania National Bank was the only one we had an account with. That bank-book was destroyed in the fire. Between the fire and August, 1907, the Germania National Bank was the only one we had a balance in and that still remains here; these people took it over. This is the only bank account outside of the Germania, between the date of the fire and the 29th of August, 1907. During that period we had no active bank account. We simply had a balance left remaining in the Germania at the time of the fire of \$6.42. The only money paid in between the date of the fire and the opening of the bank account in August, 1907, was on account of my salary; a check was given to me and I credited it to the account of Mr. Cutting and took the money without passing it through the bank.

The \$1,175 that the books show Mr. Cutting paid on the 26th of February, 1907, was not deposited in this bank. I don't remember of it ever being paid.

Mr. WHITMORE.—Then in June, 1907, you took this first note that you say was cancelled by the giving of this note [125—32] you have produced now?

A. Whatever the date in that cash-book is, that was the date. And that was the amount represented by the check of Mr. Cutting, \$1,175. I had the check for it. I never personally had the proceeds of the check

(Testimony of H. W. Wernse.)

in my possession, but I had the check. I could not tell whether it was deposited or not. This is the only bank-book we have. This has been some time ago. The entries in there of February 28 and June 1st confuse me; I don't know why it was that length of time. They are my entries.

Mr. WHITMORE.—That is all with this matter. I don't desire the bank-book.

The WITNESS.—(Continuing.) 505 shares of stock in this company is standing in my name. I personally own 505 shares. There is one certificate issued to me as trustee. That is my own personally. I did not pay any money into the company for the stock. In the beginning of it there were certain options and trusts and stock turned over to the Monetary Trust Company in which I had an interest,—General Hart and myself, and for that The Monetary Trust Company issued this stock; that is how I got my stock.

I have here, I think, the whole transaction. I think the minute-books will show the transaction.

This letter written on General Hart's letter-paper, that was signed by General Hart has gone through the fire, and I don't know whether I can read it; it is the letter that offered to the company the assets that were turned over to the company at the time of the organization— [126—33]

Mr. WHITMORE.—Q. Does the letter state what the assets are?

A. I think the minute-book can be easier read than this. The date of the letter is March 26, 1904. I



(Testimony of H. W. Wernse.)

think you will find it right in the first minutes.

Mr. WHITMORE.—I find, your Honor, in the minute-book a reference to a proposition submitted by Mr. W. H. H. Hart, but it does not give the proposition nor the property.

The COURT.—You had better read them if you want them to go into evidence.

Mr. WHITMORE.—This is the minutes of the stockholders' meeting of The Monetary Trust Company called on the 26th of March, 1904. There were five shares each. "Stockholders' meeting, H. B. Mayo, 5 shares, W. J. Morgan, 5 shares, H. W. Wernse, 5 shares, Albert Betz, 5 shares, Dan Van Wagenen, 5 shares, represented by H. B. Mayo, proxy."

There were 25 shares issued at that time, apparently. This is the organization meeting, stockholders' meeting, at the time of the organization, and that appears to be the subscribed stock. This item evidently refers to that paper produced by the witness, which is as follows: "Mr. William H. H. Hart submitted in behalf of himself and associates a proposition in writing to turn over to this company certain options and contracts held by them in consideration of the issuance to H. W. Wernse as trustee of 2,000 shares of the capital stock of this company, and also to pay into the treasury of this company \$10,000 within one year, for and in consideration of the issuance of an additional 1,000 shares of said stock to H. W. Wernse, as trustee, as fast as the same are paid for at the rate of \$10 per share; and on motion of W. J. Morgan and second of

(Testimony of H. W. Wernse.)

H. W. Wernse, said proposition of said Hart and associates was unanimously accepted. There being no further business before the stockholders, on motion, the meeting adjourned. H. B. Mayo, President; Albert Betz, Secretary." [127—34]

Q. Is that the paper you have in your hand, Mr. Wernse, the paper that was submitted at this stockholders' meeting? A. Yes.

Q. Can you read that paper and determine what property was turned over? A. I think I can.

(It is offered and received in evidence without objection and is as follows):

"To the Monetary Trust Company and to the Stockholders and Board of Directors thereof:

Gentlemen: I hereby make you the following proposition and offer said company a certain option and contract I hold authorizing me to make a loan of 8,000,000 yen, Japanese money, or its equivalent, to the Japanese Government, together with all commissions and emoluments to arise thereunder and coming to me.

2d. I also offer to assign, sell and transfer to your said company all commissions on and to arise out of that certain contract now under consideration with George W. Brown, M. E., the California Gold Recovery Company, a corporation, and the owners of the Canon Placer Mining claims on the Hassayampa River, and tributaries, in the County of Yavapai, Territory of Arizona.

3d. I also offer to turn over or cause to be turned over to your company certain business in the In-

(Testimony of H. W. Wernse.)

vestors' Protective Bond & Trust Company.

The foregoing will, in the judgment of the undersigned, ultimately produce and be equivalent to and pay to said trust company a sum greater than the par value of the 2,000 shares of stock hereafter mentioned; but, however, I do not so guarantee.

The consideration myself and associates demand for the foregoing is that your company immediately issue, as fully [128—35] paid up, 2,000 shares of the capital stock of your said company, to be issued to H. W. Wernse, as trustee.

Second: If your said company will issue an additional 1,000 shares of the capital stock of said company, fully paid up, I will pay or cause to be paid into the treasury of said company the sum of \$10,000, as wanted, and will secure for said trust company business sufficient to net to said company in due time the sum of \$90,000, or sufficient to pay said shares in full, said shares to be issued to said H. W. Wernse, as trustee and to be re-transferred to myself or such person or persons as I may direct as fast as paid for at \$10 per share.

I further agree that if this proposition is accepted by said company I will and do hereby consider said shares in full payment for all services rendered, and the compensation I am or may be entitled to therefor, for promotion and the organizing of said trust company.

It is distinctly understood that if this proposition is accepted by your company, I do not guarantee that said contracts or business so transferred as aforesaid,

(Testimony of H. W. Wernse.)

will produce sufficient money to pay up said 3,000 shares in full, and that I am not to be held at all liable should there be a deficiency in that regard; and that the trust company takes its chances as to the ultimate result.

I agree that if any of said contracts shall fail I will endeavor to secure for said trust company others equally as good.

Yours truly,

WM. H. H. HART,"

Mr. WHITMORE.—I ask that that be marked.

The COURT.—I would like to have that bank-book, too, in evidence. [129—36]

Mr. WHITMORE.—I will offer this bank-book "Plaintiffs' Exhibit 1," and that letter just read as "Plaintiffs' Exhibit 2."

The WITNESS.—I do not believe the company realized any money upon these trusts referred to in this document just read, unless it was, as the books show there; the books will show what was realized off of some contracts—the cash-book. Underwriting the Modern M. & M. Company,—\$100 fee on June 14.

The COURT.—That is not described in General Hart's letter?

A. It is a part of the business that came in through General Hart.

Q. How does this appear—how do you know?

A. I know from the business that was done, that was brought in.

Q. He speaks of contracts in that letter. This has



(Testimony of H. W. Wernse.)

nothing to do with any contract that he held, did it?

A. He agreed to produce business and this was some of the business.

Q. That letter deals with business that he then had secured. How could this relate to it?

A. I don't know where any of the contracts actually produced any money excepting in this way, where other business was furnished.

Q. Where are these contracts? Have you them among your papers?

A. I do not believe I have. Here is a commission agreement. Every one of these papers I do not find, just the bearing of them.

The COURT.—Q. Are you able to find any of these contracts referred to in that document?

A. There is a contract with the Stanislaus. I believe it was [130—37] referred to in the letter.

Q. Is that referred to in the letter?

A. I believe it was.

Q. It cannot very well be because it is dated two or three months after the organization of the company on the 26th of March. This is July 15, 1904.

Mr. WHITMORE.—Q. What were those contracts? You were connected with the company at that time?

A. Yes, I was interested in this transaction. One of these contracts was a contract for the sale of some property which was under way—looked like it would be closed up in a very short time. If I had that letter, I could tell each one as we go along. I [131—

(Testimony of H. W. Wernse.)

**37½]** have never read the letter since the fire. In this letter it says, first, the assignment of this option for making a Japanese loan. They had secured the money, that is, the promise of the money from New York, and the Japanese Government had promised to take it in their order; they were borrowing money from the United States, different loans were being made, and the war with Russia was ended before this loan was taken up. We had a letter from a representative of the Government here, contracting to take the loan, through General Hart. The second was the California Gold Recovery Company; that was a sale of some of their property; that was what I spoke of. Third, business of the Investor's Protective Bond & Trust Company; that was underwriting stock with bonds. The first business on that was this Modern M. & M. Company for which they paid a fee of \$100. The value of this 2,000 shares of stock that was to be paid was \$10 a share, \$20,000.

Q. Is that all they got out of it, that \$100?

A. They got 100,000 shares of the El Dorado Basin Gold Dredging Company stock. That is part of the other business.

Q. What do you mean by "the other business"?

A. He says here he would produce other business.

Mr. WHITMORE.—Q. Have you either one of the contracts that are referred to in this letter of General Hart?

A. I am just looking for them. **[132—38]**

It was admitted by counsel that the date of Mr. Hart's letter of proposal to the Monetary Trust Com-

(Testimony of H. W. Wernse.)

pany was the date of the organization of the company, March 26th, 1904, and that the date of the transfer of the 1175 shares of stock of the Point Richmond Canal & Land Company to the defendant Cutting by the Monetary Trust Company was December 20th, 1906.

Mr. WHITMORE.—Here is one of the contracts that he has produced. I will offer this in evidence, This is on the letter-head of the Investor's Protective Bond & Trust Company, dated San Francisco, California, December 29, 1903, I think it is intended for and addressed, "To Whom It May Concern." Have you any objection to it?

Mr. HART.—My own judgment is that this case will not turn upon this at all; it seems to me that this whole transaction depends upon the question, How much did Mr. Cutting pay directly or indirectly for this stock, and what was it worth at that time? There is no showing that these plaintiffs have any right to complain.

The COURT.—How do you mean, no right to complain?

Mr. HART.—They have not shown that they own any stock or bought any stock or anything else.

The COURT.—I thought that was conceded by your statement.

Mr. HART.—It is denied in the answer.

The COURT.—I understand, but denials are superseded by a statement which admits certain things. I understood your contention to be that

(Testimony of H. W. Wernse.)

the only material thing was this transaction between—

Mr. HART.—(Intg.) The answer admits that one of these plaintiffs owns five shares. There is no admission as to the balance. [133—39—40]

Mr. WHITMORE.—Q. Mr. Wernse, how did the company come to get this \$1,093 that the books show they hold in trust?

A. We accepted a trusteeship from the Pacific Underwriting & Trust Company and there was certain property which we received to be held in trust by us for them, and this money was money paid in to us in releasing the property out here in Sunset District; we hold the money in place of the property.

The WITNESS.—We have never been able to locate that company since 1906, the fire.

This stock-book—the stock certificate book, in fact, all these books have been kept by me in the safe all the time. I have never written in them that I know of; I just kept them for Mr. Betz.

This stock, 2,000 shares of stock that was originally issued, to me as trustee,—all those trustee certificates were cancelled and we issued other certificates. [134—41]

I can tell from the stock-books how much stock Mr. Cutting has in this company; it is in the books.

On April 30, 1904, he had 25 shares. He paid \$250 for that,—\$10 a share. January 9, 1905, 100 shares, for which he paid, \$1,000. He paid the money. The books show that. It was paid in installments of



(Testimony of H. W. Wernse.)

different amounts. I mean it is a part of this transaction we were going over yesterday. We did not issue the stock until there had been a lump sum paid. The next one is May 3, 1905, 305 shares; he must have paid \$3,050 for them.

Q. Have you got any account in your cash-book of the payment? You never received that money, did you, for this stock, that \$3,050?

A. The stock was issued on that basis, Mr. Whitmore, and I myself took it from the stock-book. It was paid in.

Q. You have not any account of that money received, have you? A. The cash-book, that is all.

The COURT.—Q. Has it ever been paid in?

A. Yes, it has been paid in. The cash has been paid in, and there were securities paid in which were taken by the directors and accepted as cash at a meeting of the board of directors.

The COURT.—That is absolutely meaningless. Show us what it was.

A. I want the minute-book. On the 17th of December, 1904, "After a discussion of the question by the board, it appeared for the best interests of the company that its promoters should have such stock only as has been paid for at the rate of \$10 per share, either in securities or money; and upon motion of H. C. Cutting and second of W. J. Morgan, it was unanimously resolved, that the company hereby accept the offer of the stockholders of this company to surrender all stock [135—42] except the following: H. C. Cutting, 100 shares; H. B. Mayo,

(Testimony of H. W. Wernse.)

220 shares; William H. H. Hart, 10 shares; H. W. Wernse, trustee, 1000 shares.”

Q. What has that got to do with this 305 shares?

A. It was after this date and it was either paid in by money or securities.

Q. What securities? Your books must show the property of the company. If the company received money, or if they received securities, the books should show. You do not keep things in the air, do you?

A. But our ledger was lost in the fire, and in that ledger appeared these securities.

Q. But you have been with that company now constantly all the way through. You have got some memory as to what securities came in. What were they?

A. We had 200,000 shares of El Dorado Basin Gold Dredging Company stock that was being sold at the rate of 25 cents and we took it in on the basis of 10 cents, and our minutes show we were going to offer it for sale for 20 cents a share. The Monetary Trust Company was the owner of that stock. We turned the stock over to it, Mr. Hart and myself.

Mr. Cutting paid for the 305 shares that I have just found a certificate, or the stub for, in cash.

I find that up to May 3, 1905, Mr. Cutting had paid in cash \$1,826.25. That 305 shares, if I remember rightly, the minutes will show it was issued to Mr. Cutting from that trustee stock. A part of these payments were paid in as the office required.

(Testimony of H. W. Wernse.)

I think the minutes would show that 305 shares was issued in lieu of part of that 1000 shares of the trustee stock. I do not find the minutes of that transaction. It was about May 3d, though, that we started to do the first work in Richmond on the canal. Mr. Cutting put the money up for that work. He subsequently had more stock issued, on October 14, 1905, 150 shares. And then January 5, [136—43] 1906, 80 shares. And September 1, 1906, this certificate, or the stub says, "Issued stock to Cutting at \$10 per share for expenses paid to and including December 1, 1905. September 1, 1906, 93 shares."

The WITNESS.—(Continuing.) \$159.25 was paid by Mr. Cutting in May, 1906, for office expenses and opening up a safe and getting up all the papers that we could from the safe to the other office. In June \$75 was paid by Mr. Cutting to me as salary. In July, \$75 was paid; that was also to me as salary, and during August, \$75 was paid to me as salary; September, \$75 was paid; I received it as salary. October, nothing. There was nothing paid to me; that was the last payment. The books show how much Mr. Mayo paid in for the benefit of this business. June 2, 1904, \$200; June 11, 1904, \$1000; June 30, \$30; October 26, 1904, \$25.

That was paid in after the \$1,000 in 1905.

June 2, 1904, \$200; June 11, 1904, \$1,000; June 30, 1904, \$30; October 26, 1904, \$25; January 10, 1905, \$300; February 1, 1905, \$100. I guess that is all.

(Testimony of H. W. Wernse.)

The COURT.—Q. What stock did Mr. Mayo have?

Mr. WHITMORE.—Mr. Mayo had the stock of the plaintiffs in his name, but it was really the stock of one of the plaintiffs in this case, a portion of it is.

Q. Didn't Mr. Mayo pay in \$5,000, Mr. Wernse?  
\* \* \*

A. No, I don't remember that. I don't remember any time that he had \$5,000 paid in in a lump.

In the Journal on April 1, 1904, Mr. Mayo paid \$125 on account of the rent; he paid that direct and we gave him credit for it. On May 23d, 1904, Mr. Mayo had advanced \$4.70 for advertising and telegrams. May 11th, 1904, Mr. Mayo paid Mr. Bishop for the office furniture which was in the office when we took it over,—\$350. On May 31, 1904, Mr. Mayo paid [137—44] \$850 for some Marconi stock—70 shares of Marconi stock.

On May 31, Mr. Mayo paid \$3.25 for telegrams. On February 28, 1905, Mr. Mayo turned over to the trust company a note of W. H. H. Hart for \$1,000 with interest thereon of \$210. That note was cancelled, paid by General Hart paying bills of the company after the fire. That meeting was just held recently when the note was taken up and discussed at a meeting, about a month or two ago. It does not appear here; it appears in the minute-book.

The COURT.—Q. It must have been carried on



(Testimony of H. W. Wernse.)

your books as an asset. How did you write it off?

A. That entry has not been made as yet, your Honor. It was just a few months ago and there is no entry made. I have to make all the entries and everything else that has been done, and my time is so occupied, it is impossible to do it; that is all.

Mr. WHITMORE.—Q. Will you turn to the stock-book again and tell us how much stock stands in the name of either one of the Woodwards, the plaintiffs in this case?

A. F. A. Woodward, one share, January 5, 1905, 4 shares January 5, 1905. That is 5 shares.

Mr. WHITMORE.—Q. How much stands in the name of Mr. H. B. Mayo?

A. 5 shares, March 26, 1904. 50 shares issued March 30, 1904. 100 shares, January 9, 1905. 160 shares January 9, 1905. 200 shares, January 9, 1905. 90 shares, January 9, 1905. That is all.

I hold that stock in trust, issued to me as trustee, for myself. I have never paid anything to the company for that stock only securities. These securities and the property that I turned over to the company for that stock are 100,000 shares of El Dorado Basin Gold Dredging Company's stock.  
[138—45]

The COURT.—Q. Tell us about that. What was that institution?

A. A company that owned valuable placer claims at El Dorado Basin in Arizona. Nothing was ever realized out of it, but at that time Mr. Mayhew and

(Testimony of H. W. Wernse.)

Mr. Brownell, two successful dredger men up in Oroville, had passed on the property and were going to put a dredge on the property; in fact, they went down, made their preliminary tests and reported that the property would pay, pay handsomely.

\* \* \* This company did not take anything that was offered them in the way of alleged securities and issue their stock for it; but they investigated this. They had nothing to do with the working of it. They had Mr. Brownell and Mr. Mayhew; they were practical men in the dredging business.

Q. They were entirely in the hands of other people as to whether they should realize anything in it or not?

A. It was a different corporation; had different directors and officers than the other corporation.

The way we got that interest in the El Dorado Basin Gold Dredging Company, the prospector who found the property came to General Hart and myself with it and we looked into it and secured the parties to put up the money to make a preliminary examination and bought the property. It stood me two or three months' time with these people going through with them, finding somebody who would take it,—who would take it over and work it, who were successful men, who understood the gold dredging business. I never put any actual money in it; I invested my time.

Mr. WHITMORE.—Q. Do you know whether General Hart put any money into it?

(Testimony of H. W. Wernse.)

A. Only I suppose in financing this prospector from time to time to live on while he was here.

The capital stock of that company was \$3,000,000.

I could not tell you offhand how much stock General Hart [139—46] got; I think 300,000 shares.

Q. And you unloaded it on to the Monetary Trust Company for the stock that you received from that company?

A. No, I did not unload it. We transferred it to them.

Mr. HART.—I will waive cross-examination and call him directly. Counsel would probably object to a great many questions I might ask on cross-examination, and I will put them in as my own testimony. That is all for the present, Mr. Wernse. [140—47]

**[Testimony of Henry B. Mayo, for Plaintiffs.]**

HENRY B. MAYO, called for the plaintiffs and duly sworn, testified as follows:

I am the H. B. Mayo mentioned in the minutes of the Monetary Trust Company as one of the directors of that company. I am acquainted with the plaintiffs, the two Woodwards, in this action.

Mr. WHITMORE.—Q. The evidence here shows that you have 605 shares of stock of that company. Just state to the Court who is the equitable owner of that stock.

Mr. HART.—I object to that question as calling for the conclusion of the witness instead of the fact.

The COURT.—Yes.

(Testimony of Henry B. Mayo.)

Mr. WHITMORE.—State the fact in reference to the acquisition of that stock by you.

The COURT.—The ownership of the stock.

A. When the company was incorporated by General Hart and myself, we were the owners and promoters of the company; it was agreed that we should each take 500 shares of promotion stock for our services in incorporating the company, and that we were to have the privilege of buying 500 more shares at \$10 a share. I told General Hart that I had a client in Peoria, Illinois, that would take my 500 shares, and give us \$5,000 for it, a Mr. H. J. Woodward; he sent me \$5,000 and I paid it over to the company for the 500 shares.

Q. Then these 500 shares of stock belong to H. J. Woodward?

A. H. J. Woodward, yes, one of the plaintiffs in this case. He resides in Peoria, Illinois. The other 105 shares belong to me. 500 shares belong to Mr. H. J. Woodward, and five belong to Mr. F. A. Woodward, and 105 to me. For Mr. H. J. Woodward I paid in \$3,000 in one thousand dollar payments. I turned over to the company General Hart's note for \$1,000 secured by 300 shares of the stock of the Monetary Trust Company, and for Mr. Woodward I [141—48] paid in another \$1,000 in payments at different times when the company needed the money. On my account, for my own hundred shares, I paid in \$1,000, in payments at different times.

Q. Do you know anything about the payment that has been made to this company for the stock issued to Mr. Cutting?



(Testimony of Henry B. Mayo.)

A. Myself and Mr. Woodward are the only people who ever paid any money into the Monetary Trust Company, except so far as Mr. Cutting paid his own office expenses where ostensibly the offices of the Monetary Trust Company were held. The Monetary Trust Company itself has done no business or has had no use for an office or a corps of assistants or clerks, or their help. The Monetary Trust Company has had its office with Mr. Cutting, and the books of the company have always been and still are there. The only business that the Monetary Trust Company has had from its inception of any amount was the incorporating and financing of the Point Richmond Canal & Land Company which was undertaken right after the Monetary Trust Company was incorporated. The Monetary Trust Company paid the expenses of incorporating the Point Richmond Canal & Land Company and paid for the bond issue which the Point Richmond Company made and bought the land in Point Richmond, and attended to the work and paying the expenses of everything that was done for the first few months of its existence. \* \* \* The Point Richmond Canal & Land Company. For this they were to receive one-half of the stock and they were to promote the sales of the bonds and the stock. Mr. Reichart and myself had secured this land from Mr. Mintzer and turned it over to the Monetary Trust Company, and we were to retain one-half; the thing stood in that condition for some months. The Monetary did not succeed in selling its stock or its bonds and Mr. Cutting, who was then president of

(Testimony of Henry B. Mayo.)

the Monetary and had absolute control of it; as he was also president [142—49] of it and in absolute control of the Point Richmond later on, Mr. Cutting offered to take over the Point Richmond proposition—the company had \$64,000 of its bonds in the treasury and had an equity in this land. Mr. Cutting offered to take enough bonds to start the sale of lots in Point Richmond and put the property on the market.

The WITNESS.—(Continuing.) I was not at the meeting at the time of this transfer of the 1175 shares of the Point Richmond Canal & Land Company's stock to Mr. Cutting. I think I was in the office the day afterwards. As to whether Mr. Cutting paid any money at that time or not, I only know what Mr. Wernse told me the following day of two after. I was living at Sacramento at that time, and whenever they would hold a meeting—whenever they called a meeting, either of the Monetary or the Point Richmond directors or stockholders, by giving me a notice, that was received generally after the meetings were held. If I received it and came down here the meeting was postponed; so that I did not get to attend very many meetings at that time. The day after the meeting was held I was here and Mr. Wernse told me Mr. Cutting had bought the stock and given his check for it and they had immediately loaned the money to Mr. Cutting.

Q. Where was the office of the Point Richmond Canal & Land Company?

(Testimony of Henry B. Mayo.)

A. It was always with the Monetary.

Q. That was in Mr. Cutting's office? A. Yes.

Q. At all times?

A. At all times. I objected to the sale of this stock to Mr. Cutting on the ground that Mr. Cutting had agreed to carry the interest of the Monetary in consideration of having received 51 per cent of the stock for nothing; but he was in control of the Monetary.

Q. 51 per cent of what stock? [143—50]

A. Of the Point Richmond Canal & Land Company. He was given 51 per cent of the Point Richmond Canal & Land Company stock for absolutely nothing. It carried with it the \$64,000 in bonds. He agreed at that time that he would—

Mr. HART.—I object to it on the ground that if there is any agreement, it should be called for and produced.

The COURT.—If it is in writing, it should be produced or accounted for.

Mr. WHITMORE.—Q. Do you know of any agreement in writing with Mr. Cutting to that effect?

A. I don't think there was any; it was not entered upon the minutes of any meeting that now certifies it. What the Point [144—50½] Richmond Canal & Land Company minutes might show if they were here, I don't know. I suppose they were destroyed in the fire.

On cross-examination the witness testified as follows:

I never had a contract for the land that was afterwards owned or claimed by the Point Richmond

(Testimony of Henry B. Mayo.)

Canal & Land Company. Mr. Reichart had charge of the negotiations and he may have had a contract, but if he did, I don't know it; I never saw it, and don't know the terms except as we carried them out. I know we gave the bond issue and received the deed.

The Point Richmond Canal & Land Company was organized about a month after the Monetary—about the 1st of April, 1904. The Monetary Trust Company organized that Company. Mr. Reichart and myself, and I think Mr. Betz organized the Point Richmond Canal & Land Company.

The COURT.—General Hart was mistaken in saying, then, that the Canal Company was organized, as the parent company, before the Monetary Trust Company was organized?

A. He certainly was; I brought the Point Richmond property to this company; I saw the property. Mr. Reichart and I were in partnership in the proposition, and then by our joint work we got an agreement with Mr. Mintzer to convey the property for bonds. That was not put in writing that I know of it was carried out. I told Br. Reichart when we first planned getting the land, “we have just incorporated and promoted a company, the Monetary Trust Company, which I think can handle the Point Richmond land.” It pleased him, and we agreed between ourselves to give the Monetary a half interest for handling it. It was submitted to the Monetary Trust Company before the Point Richmond Company was incorporated. I had the Point Richmond matter under [145—51] consideration before the



(Testimony of Henry B. Mayo.)

incorporation of the Monetary Trust Company. We organized the Monetary Trust Company with General Hart, for the purpose of handling any proposition that came up in our respective practice. You were not a director in either company; you were always interested. There were about 400 acres of land in this contract; it was what I would call swamp and overflow land, under water at very high tide.

A. It was salt marsh and tide land. It was right on what is known as the South Marsh, extending from the Santa Fe Depot in Richmond. It was a salt marsh, overflowed by salt water.

Mr. HART.—Q. The Point Richmond Canal & Land Company in short was incorporated and this property was deeded to that corporation by Mr. Mintzer who had the legal title—that is, the title of record; is that correct?

A. Mr. Mintzer—I think his mother-in-law,—the Tuxberry estate, the owners of the land, deeded it to the Point Richmond.

\$400,000 worth of bonds were issued on the land; there was no money paid. The terms of the bonds permitted the sale of the land.

The COURT.—Q. What terms were the bonds, 10, 20 or 30 years?

A. 20 years, I think; I don't remember. I signed them all, but I don't remember what was the actual date of them. It must have been about in May or June, 1904, I should think.

The COURT.—Q. What was the consideration for the land; how many bonds?

(Testimony of Henry B. Mayo.)

A. \$336,000 worth of bonds were given for the land and \$64,000 were retained by the Point Richmond Canal & Land Company by consent of the former owners for the purpose of developing land. I [146—52] put the expense of incorporating the corporation up to the Monetary and the Monetary put it up to the Point Richmond. I think the first amount was three or \$400—it was a five hundred thousand dollar corporation. What I paid, I paid into the office; the Monetary paid the fees; the books of the Monetary show they paid the fees and they are there. I was president of the Monetary Trust Company for the first few months, up till the time Mr. Cutting came into the office. These bonds were signed by me as secretary of the Point Richmond Canal & Land Company. I think those bonds were issued before Mr. Cutting came into the Monetary Trust Company, but I could not say positively—about that time. The Central Trust Company was the trustee, I think.

Mr. HART.—Q. Who was to pay the expenses of incorporation, that is, in creating the mortgage for the payment of the bonds?

The COURT.—Of the Point Richmond?

Mr. HART.—Yes.

A. The only expense there was, I think, was \$200; the trustee wanted some money and the Monetary paid it. The preliminary costs of the creation of the Point Richmond Canal & Land Company were advanced either by me or by the Monetary Trust Company. That is about all the money that was put into

(Testimony of Henry B. Mayo.)

the Point Richmond Canal & Land Company by the Monetary Trust Company. The bonds alone, the printing of the bonds alone cost more than \$500, I think. I think the Monetary has put in a thousand dollars. I don't think the printing of the bonds was ever paid for—the fire came along. The Monetary Trust Company paid the actual money that was out. I think it was about a thousand dollars.

Q. Then, at the time that the Monetary Trust Company made this arrangement with Mr. Cutting to transfer the 1175 shares, providing it was an arrangement of that kind, the Monetary Trust [147—53] Company had not put in more than a thousand dollars into the Point Richmond Land & Canal Company?

A. That was several years after; I could not say—two years and a half.

The COURT.—Several years after the issuance of the bonds? A. Yes.

The Monetary sold Mr. Cutting \$10,000 worth of the bonds of the Point Richmond Canal & Land Company upon his agreeing to take more when that money was spent, and we gave him control of the Point Richmond Canal & Land Company for absolutely nothing. I am sure of that; the books show that. I presume the books will show more accuracy than I can state how the stock of the Point Richmond Canal & Land Company was divided originally. I think that the entire capital stock of the Point Richmond Canal & Land Company was issued to Mr. Reichart for the transfer of that prop-

(Testimony of Henry B. Mayo.)

erty. Mr. Reichart and I were equal owners in the proposition. I think Mr. Reichart had an office at the time that we organized that company in the Mutual Savings Bank Building, that is, Fred Reichart, Mr. Reichart served as a director in the Monetary Trust Company, I think, one or two months; it was some time during the first year of its existence. The Monetary Trust Company undertook to sell sufficient bonds and stock to raise the money to improve this land at Richmond and to fill it in and to make it marketable; it undertook to sell sufficient bonds and stock to put the land on the market. I have said before that the Monetary Trust Company conveyed to Mr. Cutting a majority of the stock which carried with it absolute control of the company and of the bonds. Mr. Cutting agreed to take \$10,000 worth of the bonds and pay for them, and when \$10,000 of money was exhausted, that he would take more bonds or get his friends to do so.

The COURT.—What do you mean, that he was to take these securities and exploit the land? [148—54]

A. Exploit the land, and carry one-quarter for the Monetary Trust Company and one-quarter for Mr. Reichart.

Mr. HART.—Q. Now, you have already stated that the entire stock of the Point Richmond Canal & Land Company, with the exception of the qualifying shares of the directors was transferred to Mr. Reichart for the transfer of the Tuxberry contract. Now then, how did the Monetary Trust Company



(Testimony of Henry B. Mayo.)

get the control of that stock?

The COURT.—Q. How did that stock get out of Reichart into the Monetary Trust Company?

A. There were meetings and the parties came to an agreement. By agreement between Mr. Reichart, the Monetary Trust Company and Mr. Cutting; the agreement was not in writing, but it was carried out. [149—55—56]

How did the canal company stock get into the hands of the Monetary Trust Company? I am not asking how much there was of it, or anything, but how did it get in there?

A. It was transferred to the Monetary out of the entire stock which was originally issued to Mr. Reichart when all the parties concerned came to an agreement as to what should be done.

Q. What was that agreement?

A. The agreement in the first instance was, although it was never issued—

Q. (Intg.) You mean never consummated?

A. Never consummated,—was that the Monetary was to float the proposition and raise the funds for a one-half interest.

Q. That was not carried out?

A. That was not carried out—that was carried out, in this way: They produced Mr. Cutting—the Monetary produced Mr. Cutting and Mr. Cutting was given control of the company.

Q. For the purpose of carrying that out?

A. For the purpose of carrying it out. In order to get Mr. Cutting his half Mr. Reichart had to give

(Testimony of Henry B. Mayo.)

up one-half of his interest and the Monetary had to give up one-half of its interest which gave Mr. Cutting control.

Mr. HART.—Q. When was that transaction that you have just answered in the last answer carried out?

A. I think it was about December, 1905, but the books will show; I don't remember. [150—57]

#### AFTERNOON SESSION.

Cross-examination of HENRY B. MAYO, resumed.

Mr. HART.—Q. Mr. Mayo, when we adjourned, you gave an answer, in substance, to questions I put to you how the stock of the Point Richmond Canal & Land Company was divided, you said that the books would show. Now, tell us what books you refer to.

A. I merely said that I supposed that if the Point Richmond Company had kept any books, that their stock certificate book would show how the stock had been issued. I don't know. I was an officer at the beginning, yes.

The WITNESS.—(Continuing.) It is a fact that the original talk between Mr. Reichart and myself was that the Monetary Trust Company would undertake to finance the Point Richmond Canal & Land Company. Our first talk was before Mr. Cutting was connected with it, and also before Mr. Cutting had any interest in the Point Richmond Canal & Land Company. There was never any contract in writing, in any of the affairs involving the buying or the incorporating of the Point Richmond,

(Testimony of Henry B. Mayo.)

so far as I know. It was a family affair, among ourselves, and arranged as I have said. I think it was just after the incorporation of the Point Richmond Canal & Land Company that Mr Reichart and I were interested in this Richmond land deal. Mr. Reichart had one-half interest and I had a half interest. I think that was the status of the situation in reference to the Richmond land before the incorporation of the canal company.

Q. Was that arrangement with Mr. Reichart before the incorporation of the trust company?

A. They were both incorporated about the same time, I mean being negotiated, talked of, the same time.

The COURT.—Q. It was all one scheme, was it?  
[151—58]

A. No, your Honor, the Monetary was first formed. It was all intended to carry one scheme out, both corporations, practically. The Monetary corporation was first formed, and it was formed without any reference to the canal company. It just happened that the canal company came to my notice immediately thereafter, or about that time. I mean the canal project. It was the project first that was turned over to the Monetary or talked of to the Monetary, and it was the Monetary that put up the money to incorporate the canal company, and it then was done, in regard to buying the land and issuing the bonds and incorporating.

Mr. HART—Q. Now. you have said in answer to your counsel that you had paid in \$5,000 of money

(Testimony of Henry B. Mayo.)

into the Monetary Trust Company?      A. Yes.

Q. To whom did you pay that?

A. To Wernse, I believe.

The COURT.—Q. Now was it paid, by check?

A. It was paid in before the fire, and I have not got any record showing just how it was paid, but I think the \$3,000 was paid by check and some of the other was.

It was paid at different times,—that is, three one thousand dollar payments.

Q. Was not one of these payments the note which I gave you?

A. No; my recollection is the three payments of \$1,000 preceded the \$1,000 note.

Q. That was what was known as the Averill note?

A. I believe, now that you speak of it, it might have been to Averill; I don't remember, but it was your note.

Q. As a matter of fact, was the canal company's project consummated orally, we will say, that is, the arrangement, before you paid that money in, or afterwards?

A. That I could not say. I certainly had not paid it all in when the Monetary first took over the Point Richmond. [152—59] As a matter of fact, I am not clear as to the dates of each particular transaction.

The COURT.—Q. Were your records destroyed?

A. Yes, absolutely all of them.

The Monetary Trust Company first went into the building on New Montgomery Street at its very in-



(Testimony of Henry B. Mayo.)

ception, the day or week or month I could not remember. Its office was in the Crossley Building, at the entrance of the Crossley Building on New Montgomery and Mission, right at the street entrance. The Monetary Trust Company was the only occupant there until Mr. Cutting came in. At that time I had six offices in the Crossley Building—I mean six rooms, upstairs. Mr. Wernse was in the Monetary Trust Company's office when Mr. Cutting came in; that was all, I think. Mr. Morgan came in more than a year later. My recollection is that Mr. Morgan came in sometime during the year 1905. At that time I knew Dan Van Wagenen. I met him in your office; I think he was a promoter. Just at the time the Monetary was first incorporated Mr. Van Wagenen left San Francisco and remained away for several years. About the Japanese loan, I don't think there was anything about that but wind. I don't know who suggested the Japanese loan, but I don't think there was ever anything to it.

Q. Now, I notice here that in this organization meeting that the minutes read as follows, at least that part of it: "Pursuant to notice, duly given, a meeting of the persons named as directors in the articles of incorporation of the Monetary Trust Company was held this 26th day of March, 1904, at 11 o'clock A. M. at room 417 Crossley Building, San Francisco, California." That was at your office, was it not? A. Yes. [153—60]

Q. "At this meeting of the persons so named were present, H. B. Mayo, W. J. Morgan, H. W.

(Testimony of Henry B. Mayo.)

Wernse and Albert Betz. Absent: Dan Van Wagenen. It appeared that Dan Van Wagenen had in writing waived notice of this meeting and had executed a proxy to H. B. Mayo to be voted if a stockholders' meeting was held." Is that correct?

A. Yes.

Q. "Mr. H. B. Mayo was called to the chair, and Mr. Albert Betz was requested to act as temporary secretary. Mr. H. B. Mayo in the chair announced that the certificate of incorporation of the company having been duly issued from the office of the Secretary of the State of California, the object of the meeting was to organize the company and the board of directors by the election of officers as required by law." Those minutes are correct, are they not?

A. Those you have read are. I presume I read them over at the time, if I signed them, but I don't remember now. I don't remember whether I signed them or not. I am not certain as to the dates in an outside matter of that kind. I was practicing law at the time. While I did some business with the Monetary Company, I don't remember the date of every transaction.

Q. Now, this first stockholders' meeting, which appears on page 4 of the minute-book, recites as follows:

"First stockholders' meeting of the Monetary Trust Company. We, the undersigned, the stockholders and subscribers for stock of the Monetary Trust Company, being the owners and holders of all

(Testimony of Henry B. Mayo.)

the subscribed capital stock of said company, viz: H. B. Mayo, 5 shares; W. J. Morgan, 5 shares; H. W. Wernse, 5 shares, Albert Betz, 5 shares, Dan Van Wagenen 5 shares, represented by H. B. Mayo, proxy, do hereby give our written consent to the holding of this the first stockholders' meeting of the Monetary Trust Company, this 26th day of March, A. D., 1904, at the hour of 11–15 o'clock A. M., at room 417 [154—61] Crossley building, San Francisco, California; and we do hereby certify that all the stockholders and subscribers for stock of said company are at this meeting now here present or represented.

In Witness Whereof, we have hereunto subscribed our names this 26th day of March, A. D., 1904.

H. B. Mayo; W. J. Morgan; H. W. Wernse; Albert Betz; Dan Van Wagenen, by H. B. Mayo, attorney in fact."

Those are correct, are they not?

A. Yes. Mr. Betz and Mr. Wernse represented the interest in the stock that they owned was your stock. What stock Mr. Morgan had I think he got from you; he didn't get it from the company, and he also appeared on the board as your friend.

The understanding was that we were to have, you and I were to have five per cent each for promotion, —for promoting the Monetary Company, and that we were to do all we could to get business into the company; that was the sum and substance of the

(Testimony of Henry B. Mayo.)

whole thing. In other words, that the organization was for the purpose of promoting, a promotion company, to carry out the business of promotion; and to do that it was necessary to have certain moneys for temporary use.

There were no subscriptions for stock that I know of for less than par except 500 shares that was allowed you for \$5,000 and 500 shares to me for \$5,000; I don't think there was any stock authorized to be sold for any less than par outside of that. That was before the company attempted to do any business; I think it was within 60 days after the organization. I think it was within a week or two; I have not got the dates in my mind.

Q. I find here on page 7 of the minute-book of the Monetary Trust Company, a directors' meeting, which is in the usual printed form: [155—62]

“Directors meeting held on the 26th day of March, 1904. Mr. H. B. Mayo, president of the board, presiding. The secretary read the minutes of the previous meeting of the board, held for the purpose of organization, which, on motion duly seconded, were approved. The secretary was then directed to read to the board the code of by-laws adopted by the stockholders at their first meeting held this 26th day of March, 1904. The secretary then read the by-laws as the same are engrossed on pages of the company's book of By-laws. Thereupon, on motion of Mr. W. J. Morgan, seconded by Mr. H. W. Wernse, it was unanimously resolved



(Testimony of Henry B. Mayo.)

that the code of By-laws adopted by the stockholders at their first meeting, held on the 26th day of March, 1904, and engrossed in full on pages of the book of By-laws of this company, be and hereby are adopted as the by-laws of the company; and be it further Resolved: That each member of the board of directors, and the secretary of the company be and hereby are requested to subscribe their names to the said by-laws and certify the same in that certain book, to be kept in the office of the company, and known as and called the book of By-laws of the Monetary Trust Company. On motion, duly seconded, it was unanimously Resolved: That the office of the company be and is hereby fixed and located at No. 79 New Montgomery Street, in the city and county of San Francisco, State of California."

The WITNESS.—It is a fact that 79 New Montgomery Street was the office that was opened by the Monetary Trust Company.

Mr. HART.—Now, I suppose that your Honor will permit us in making up a digest of these by-laws for the purpose of argument or brief, as the case may be, to refer to them without calling the witness's attention to each particular entry. They are all offered in evidence, your Honor.  
[156—63]

The COURT.—Certainly. Of course if you examine the witness on any statement that is covered by the by-laws, you should call his attention to it.

(Testimony of Henry B. Mayo.)

Mr. HART.—Certainly, that is what I expect to do.

Q. On page 10 of these minutes I find the following:

“Meeting of the board of directors of The Monetary Trust Company, held at the office of the company, No. 79 New Montgomery Street, San Francisco, Cal., on June 11, 1904, at 3 o’clock P. M., pursuant to notice. Present: H. B. Mayo, president; W. J. Morgan, Vice-president; H. W. Wernse; and Albert Betz, Secretary.

The object of the meeting was to pass a resolution providing for the issuance of certain bonds. The minutes of the former meeting were read, and, upon notice of H. W. Wernse and second of W. J. Morgan, were approved as read.

Upon motion of H. W. Wernse and second of W. J. Morgan, it was unanimously resolved that a regular series of bonds be issued as follows”: Do you remember about that series of bonds, that it was here proposed to issue?

A. I remember that you suggested an issue of that kind be made.

The COURT.—That was by the Monetary Trust Company, was it?

Mr. HART.—Yes, but not on this canal project.

The COURT.—I am following you. They were never issued?

The WITNESS.—No.

Mr. HART.—They were printed and ready for

(Testimony of Henry B. Mayo.)

issue when the fire came and upset the whole situation.

The WITNESS.—I remember that we got up a form of the bonds given. It is in the minute-book, it is probably correct. I don't remember.

The object of these bonds was to use them as investment bonds, [157—64] the people paying for them.

Q. I notice on page 20 of the minute-book, meeting of June 11, 1904, the minutes state:

“On motion of H. W. Wernse and second of W. J. Morgan, it was unanimously resolved that the executive committee of this company be and it is hereby authorized to arrange one or more trust companies or banks to act as trustees for the holding of the securities of this company belonging to the bond sinking fund, and to arrange to have such bonds certified by said trust companies or banks, and that the result of such action be submitted to the board of directors for approval.”

A. I think that was passed at your suggestion.

Q. Have you any independent recollection of when Mr. Cutting began having any connection with the Monetary Trust Company?

Mr. WHITMORE.—I object to that question upon the ground that it is not cross-examination and that the record would be the best evidence.

The COURT.—I think so.

Mr. HART.—Q. I notice herein the meeting of January 7, 1905, a resolution as follows: “Mr. Mayo

(Testimony of Henry B. Mayo.)

offered his resignation as director of the Trust Company. Upon motion of Mr. F. A. Woodward, seconded by Mr. W. J. Morgan, the resignation was unanimously adopted." [158—65—66—67]

Q. (Continuing.) "Mr. Reichart just telephoned that he was willing to accept a directorship in the company and would pull the thing through all right."

Isn't it a fact at that particular meeting, when that statement came, it was because of that statement that you resigned?

A. No; Mr. Cutting always objected to my being president and said that if I would resign in his favor and let him become the president, that he would put money into the company and get his Nevada friends to invest also in the company, and Mr. Reichart was suggested at that time as a director because the Point Richmond Land & Canal Company and the Monetary Trust Company were doing business together and Mr. Reichart wished to be on the Monetary board, feeling that he could help the Monetary float the Point Richmond proposition.

The COURT.—You resigned both as president and director?

A. I resigned both as president and director, at the request of the other members on the board.

Mr. HART.—I will ask you, Mr. Mayo, whether you voluntarily resigned or whether it was because of the insistence of all the parties and myself included?



(Testimony of Henry B. Mayo.)

A. I resigned because Mr. Cutting asked me to resign and let him become the president.

I resigned as president and director. I believe Mr. Cutting was then elected. I don't remember whether I resigned as director first or president first. If I resigned as a director first, I would cease to be president. Mr. Reichart only remained on the board, I think, about two weeks, or possibly a few weeks, and then I was returned to the board.

Q. Now, I find here on page 27 of the minute-book the following: "Meeting of the board of directors of the Monetary Trust Company, held at the office of the company, March 27, 1905, pursuant to notice. [159—68]"

Present: H. C. Cutting, President; W. J. Morgan, Vice-president; Fred Reichart, and Albert Betz, Secretary.

Absent: F. A. Woodward, who had been duly notified of the time and place of the meeting. A quorum being present the president called the meeting to order.

Mr. Morgan offered the following resolution:

Whereas, the executive committee of this company some time ago entered into an oral arrangement with Mr. Fred Reichart, who was then not a director of this company, in connection with the carrying out of the Point Richmond Canal & Land Company's project; and

Whereas, this company having by reason of its inability to sell bonds of the Point Richmond Canal & Land Company, and for the further reason that

(Testimony of Henry B. Mayo.)

the Hackett Dredger could not do the work, failed to carry out its part of the agreement with said Reichart; therefore, be it.

Resolved: That in consideration of said Reichart transferring to the Monetary Trust Company 1175 shares of the capital stock of the Point Richmond Canal & Land Company, said Reichart and said canal company are hereby released from transferring any further shares of said stock in this company, the consideration for said shares so transferred being for past services rendered by this company, and for such services as it may be called upon to render in the future."

A. That was in pursuance of the arrangement that was finally made as to how the Point Richmond stock should be divided. Mr. Cutting took control of it and received 50 per cent and more of the stock without any expense himself, and Mr. Reichart intended to retain one-quarter, and the Monetary was given one-quarter.

Q. (Reading:) "Said resolution being duly seconded was [160—69] unanimously adopted. Mr. Fred Reichart informed the board of directors of this company that, having failed to carry out its arrangement with the Point Richmond Canal & Land Company, said arrangement had become null and void; and, thereupon, on motion of W. J. Morgan and second of Albert Betz, upon vote of Cutting, Morgan and Betz said arrangement was declared null and void; Mr. Reichart being excused from voting. There being no further business be-

(Testimony of Henry B. Mayo.)

fore the board, the meeting upon motion duly made and seconded, adjourned.”

The COURT.—What was that that was revoked, that had never been carried out?

Mr. HART.—The original contract for the purpose of carrying out the canal business, the business of the canal company.

The COURT.—What contract?

Mr. HART.—The oral contract, as they state here, that the Monetary Trust Company was to raise the funds for the purpose of improving the property. As a matter of fact, if your Honor please, there never was any contract in writing on that subject, so far as I know.

Q. Do you know of any, Mr. Mayo?

A. No; that arrangement that you have just read from the minutes superseded all previous arrangements, as I understand it; the Monetary was given this one-fourth, Mr. Cutting one-half and Mr. Reichart got his one-quarter. That was the end of the proposition. That was the way by which the Monetary Trust Company became the owner of this 1175 shares of the Canal Company stock. From that time on the Monetary performed its services and was not required to do anything further. If I was at the meeting, I was aware of the passage of this resolution.

Q. Well, it was on March 27, 1905. [161—70]

The COURT.—Was he present at the meeting?

Mr. HART.—He had resigned at the meeting of January 7th. I am asking him if he was aware of

(Testimony of Henry B. Mayo.)

that fact.

The WITNESS.—I consented to that distribution of the stock.

I do not remember how much stock Mr. Cutting got at that particular time,—actually got of the canal company. I know he was given control; by that, I mean he got a majority. I don't know how the stock was issued. I know the arrangement we reached at the time.

The COURT.—Q. You mean you don't know how it was carried out, but that was the understanding?

A. That was the understanding.

I still retained my office in the Crossley building—my office was in the Crossley building at the time of the fire.

I was again elected a member of the board; I think it was two or three weeks later, but it might have been more. It was probably the following meeting, but it may have been two months; I don't remember the time.

Q. I notice here on page 29 of your minute-book: "Meeting of the stockholders of the Monetary Trust Company, held at the office of said company, No. 79 New Montgomery Street, April 22, 1905, at 10 A. M.

The meeting was called to order by the president, Mr. Cutting, all shares issued being represented.

The president announced that nominations for directors were in order, whereupon, H. W. Wernse nominated the following for directors: H. C. Cutting; W. J. Morgan; H. B. Mayo; Albert Betz



(Testimony of Henry B. Mayo.)  
and F. A. Woodward.”

Thereafter they were elected?

The WITNESS.—I think that was the meeting at which I was re-elected a director. [162—71]

Q. Now, on page 30, the minutes recites a meeting of the board of directors of the Monetary Trust Company held at the office of the company, June 17, 1905, pursuant to notice. “Present: H. C. Cutting, President; W. J. Morgan, Vice-president; H. B. Mayo; Albert Betz, Secretary. Absent: F. A. Woodward.

It was moved by Albert Betz, seconded by H. B. Mayo, that the Monetary Trust Company accept the proposition of H. C. Cutting and W. J. Morgan to remodel the office by changing the partition to their liking, on the terms and conditions agreed upon between Mr. Morgan and Mr. Cutting, and permitting their respective signs on the front windows, the name of the Monetary Trust Company to be on both doors. Messrs. Cutting and Morgan to bear expenses of change.

There being no further business the meeting adjourned.”

It is signed, “Albert Betz, Secretary.”

Those minutes are correct, are they not?

A. I could not say as to who made those motions. From that time on I had nothing to do with the management of the Monetary. I probably did appear at that meeting.

Mr. Cutting had been using this office at 79 New Montgomery street, as his office to the exclusion of

(Testimony of Henry B. Mayo.)

every other line of business for a year before June 17, 1905.

He was running a regular stock brokerage business and Mr. Wernse was every morning at the stock board buying and selling stocks there—as early as 1905,—earlier than that. I don't recollect just what time Mr. Cutting started to do a stock brokerage business, but I think it was very soon after he went there.

Q. Now, I call your attention to these minutes on page 31: "Meeting of the Monetary Trust Company, held September 3d, [163—72] 1906." That is the next meeting.

"Present: H. C. Cutting; W. B. Mayo; W. J. Morgan; Albert Betz. Absent: F. W. Woodward. It was moved by W. J. Morgan and seconded by Albert Betz, that room 404, 925 Golden Gate Avenue, be made the office of the Monetary Trust Company, until the further order of the board of directors. Unanimously carried.

On motion of Albert Betz and seconded by W. J. Morgan, it was unanimously resolved that

Whereas, the annual meeting of the Monetary Trust Company not having been held, therefore said annual meeting is called for Saturday, September 29, 1906, at 12 M., at the office to said company, room No. 404, 925 Golden Gate Avenue, for the purpose of electing a board of directors, and taking into consideration whether or not the assets of the company be disposed of, such steps shall be taken

(Testimony of Henry B. Mayo.)

for the purpose of raising funds for carrying out the work at Richmond, and such other business as may possibly come before the board, and that the secretary make the necessary publication."

Do you remember that resolution?

A. No, I cannot say that I remember what resolution was passed. I remember that is what transpired. I remember that there was a meeting there after the fire to kind of get ourselves together. The Monetary Trust Company's office was at 79 New Montgomery Street in the Crossley building at the time of the fire in April, 1906. That building was destroyed and burned with the rest. I was not there when the safe was opened. They had a safe there. I know the manager of the Hall Safe Company came to me before he put it in there and wanted me to give him an order to put it in,—a large safe that must have weighed at least 12,00 pounds, and I told him we had no use for such a safe, but I believe it was afterwards [164—73] put in there. We never paid for it, however, so far as I know.

Q. I notice here a stockholders meeting of November 10, 1906, at 10 o'clock A. M., pursuant to adjournment: "1378 shares, a majority of the stock issued, being represented. Mr. Wernse nominated as directors, Messrs. Cutting, Morgan, Wernse, Mayo and Betz. There being no further nominations the nominations were closed and the secretary was instructed to cast the ballot for said persons as directors, and said persons were declared directors of this company for the following

(Testimony of Henry B. Mayo.)

year or until their successors were elected.”

You remember being elected a director at that time, do you not?

A. I believe I was, yes. At that time money had been raised to carry on the work of the canal company. As I stated, the Monetary provided all the money for the initial expenses and the bond issue. When the stock was divided Mr. Cutting took the majority of the stock, for which he did not pay a cent, and he agreed to buy \$10,000 worth of the bonds.

The COURT.—Q. Of the treasury bonds?

A. Of the treasury bonds of the Point Richmond company, and that when that money was expended in dredging or putting the lots in shape to market and on the market, he would raise other money. The fire came very soon after this arrangement was made. Now, what amount of this \$10,000 had been spent by the company before the fire I never could learn.

Nothing had been paid in. Mr. Cutting proceeded before the fire to do certain dredging at Point Richmond; he had dredging done and paid for out of this \$10,000.

I do not know who the ten bonds were delivered to.

Mr. HART.—The bonds were \$500 each. [165—74]

The COURT.—There would be twenty bonds.

The WITNESS.—I think the bonds were always in the hands of Mr. Cutting’s employees right from



(Testimony of Henry B. Mayo.)

the start, Mr. Wernse and Mr. Betz.

One or two days after the meeting at which the minutes show Mr. Cutting's check was delivered to Mr. Wernse, I first learned about the 1175 shares being sold to Mr. Cutting or claimed to have been sold. I asked Mr. Wernse what had been done at the meeting and he said Mr. Cutting bought the 1175 shares of the Point Richmond stock that belonged to the Monetary and had given his check to the Monetary company for \$1,175, and that as the Monetary did not need the money they had immediately loaned the money to Mr. Cutting. Of course I objected to this at the time, because Mr. Cutting had agreed to carry the Monetary's interests to a final conclusion of the transaction.

The COURT.—Q. Now, for the stock he had received?

A. For the stock he had already received. These properties they admit to-day are worth \$5,000,000, probably worth a great deal more. Mr. Cutting never paid a dollar for his half interest.

\* \* \* Mr. HART.—Q. Now, tell us what the arrangement was, who was present when it was made and what the arrangement was, as to the present and the future.

The COURT.—What arrangement are you speaking of now—the understanding that Mr. Cutting was to furnish the means to develop this property?

Mr. HART.—I want to know when it was made, by whom, and what was said and all about it.

(Testimony of Henry B. Mayo.)

\* \* \* Who was present at the time of that arrangement with Mr. Cutting?

A. My recollection is that you were there and Mr. Cutting was [166—75] there and Mr. Wernse was there, and myself. I could not say whether Mr. Reichart and Mr. Betz were there or not. I think Mr. Morgan was there, too. It took place in the office occupied by Mr. Cutting and the Monetary.

At that particular meeting and at that particular time, Mr. Cutting said: "I will undertake to raise the money to reclaim the Point Richmond land and put it on the market and sell it."

The COURT.—Q. In consideration of what?

A. In consideration that he receive a controlling interest in the capital stock of the canal company.

At that time the stock had practically been reserved; I don't know whether it was ever issued up to that time; I don't think it was; it was all right there among the two companies, and it was reserved to be issued in any way that should be agreed upon when the final financing came; I think it remained up to that time in Mr. Reichart's name. It took about 2501 shares to give Mr. Cutting a controlling interest in it. There were 5000 shares; one-quarter was then given to Mr. Reichart and the small issues of stock that had been made were taken out of the Monetary quarter, which cut it from 1250 to 1175—the small qualifying amounts.

There were 10 shares to each director, and I think there was 150 shares Mr. Reichart sold to Mr. A. N.

(Testimony of Henry B. Mayo.)

Lewis to induce him to become connected with the company; that was Asa N. Lewis, a man connected with the Lux estate. They call him Dr. Lewis; I think he is Mrs. Lux's son-in-law, or something of that kind.

Mr. HART.—Q. Now, Mr. Mayo, before we leave the subject, I want you to express to the Court all you know about that transaction with Mr. Cutting, how much money was he to advance, [167—76] and what was said about it?

A. It was discussed often in the meetings.

Q. But I mean this particular time when you say this arrangement was made.

A. It was discussed there, what amount would be needed, but I am uncertain as to what amount would be needed. Mr. Cutting said, "I will take \$10,000 worth of bonds and when that \$10,000 is exhausted in improvements at Point Richmond, if we have not been able to sell any of the property, I will take more bonds or get my friends to take bonds; I will see that the company has money to go ahead with."

I think there was no definite amount set of bonds that he would take in addition to the \$10,000;—only sufficient funds would be raised. I don't think that was reduced to writing, but he was given the stock. I think there were estimates made at that time of what it would cost to put the land in condition; we had an engineer. He was a man by the name of Smith; I think he went over there at that time. He made a map for us. My recollection is that the estimate was left indefinite absolutely.

(Testimony of Henry B. Mayo.)

I had absolutely nothing to do with the management of the Monetary Trust Company at the time; I merely attended the meetings to protect the interests of myself and my clients. I had nothing to do with the management and cut no figure in anything that was done. I was not allowed in any of the secret councils of the company. It is hard to say what I know about secret councils; they were all in the office there together, and I noticed whenever I would come into his office there would be a hush, nothing said. My presence always caused silence.

Mr. HART.—Q. Did you have any suspicions when you found [168—77] that they were silent when you would come to their office?

The COURT.—What is the object of that?

Mr. HART.—To show he had knowledge of sufficient facts to put him on inquiry to go into these records and look them up and examine into them.

He is the agent for the plaintiff and they would be charged with whatever their agent was charged with.

The COURT.—Proceed.

Mr. WHITMORE.—I object to that line of questions on this ground, that it is immaterial because the evidence already shows that Mr. Cutting and these other officers were acting in a fiduciary relation and it is immaterial what knowledge Mr. Mayo or Mr. Woodward may have had in the premises.

The COURT.—I am not so sure as to the effect of it. I will let it go in.



(Testimony of Henry B. Mayo.)

A. I construed their silence merely to mean that they were antagonistic to me. I did not wish to interfere with the business in any way as I hoped to see it go ahead and succeed.

I knew both of the plaintiffs in this case when they were school boys, possibly 7 or 8 years old.

The COURT.—Are the plaintiffs present? I would like to get the parties identified in my mind.

Mr. WHITMORE.—No, they are both in Illinois.

The WITNESS.—(Continuing.) I have kept up the acquaintance ever since; they are my first cousins. I think I swore to the original bill of complaint in this case; I had consulted [169—78] the plaintiffs before that bill was filed.

The reason these 500 shares,—the portion that I claim they own,—have not been transferred to their names is because they desired to keep it in my name because I was here and could look out for it.

The \$5,000 that were sent out here were sent by Mr. Woodward to me, and I claim that I paid the whole of that \$5,000 into the corporation. It is not a fact that I turned over to them the shares of stock that were set apart to me as promotion stock; I had no promotion stock.

I think the total number of shares standing in my name or in their names amounts to 610 altogether.

Q. Now, as a matter of fact, that stock was really bought by you from the corporation, was it not?

A. Yes.

The COURT.—How do you mean? He is just saying he bought it for them. Do you mean physi-

(Testimony of Henry B. Mayo.)

cally bought by him, or do you mean bought for himself first?

Mr. HART.—Yes.

The WITNESS.—While I bought the stock and paid for it it was understood and within the knowledge of everybody concerned that it was Mr. Woodward's stock, that he was putting up the money.

The COURT.—Q. You were not buying it for yourself?

A. I was not buying it for myself.

Mr. HART.—Q. With whom did you have that understanding?

A. With yourself and Mr. Wernse. I don't think there was really anybody at that time taking any active part in the Monetary excepting Mr. Wernse and yourself and myself,—that is, in the very beginning.

I have already stated that 2,000 shares of stock were to be issued for promotion purposes and that 1000 shares were to [170—79] be sold at \$5 per share within a year.

It is not a fact that it was 600 shares of the promotion stock that I received that went to the plaintiffs in this case,—no part of it. There was not 2,000 shares issued for promotion. I don't know whether that is a mistake on the books, minutes, or whether the plan was changed, but as adopted there was only 1,000 shares of promotion stock issued, 500 to yourself and 500 to myself; that was afterwards cancelled. The 500 shares that went to Mr. Woodward were paid for in cash.

(Testimony of Henry B. Mayo.)

The COURT.—Q. But you say that the 1,000 shares of so-called promotion stock, that went, 500 shares to you and 500 shares to General Hart, was afterwards cancelled.

A. When Mr. Cutting came in he objected to that, and I consented that my interest in it be cancelled; that is, be returned to the treasury. While I had put in the Point Richmond proposition into the Monetary, which was the only piece of business they ever had that brought them anything that amounted to anything, yet, at the same time, Mr. Cutting was willing to allow Mr. Hart to put in 100,000 shares of El Dorado Basin Gold Dredging Company stock which we all knew at that time was absolutely worthless; General Hart was allowed to put that certificate in there at a certain figure and take out Monetary stock for it, which allowed him his promotion stock, but I was not allowed mine.

The WITNESS.—(Continuing.) Mr. Woodward sent me that \$5,000 at the time the first payment was made of \$1,000 into the Monetary; I think all my payments were in checks; I have not the checks; it was before the fire, and the checks were destroyed in the fire so that I have not got any of them. I saved absolutely no books showing the payments.

[171—80]

The books as read this morning, I know nothing about. I know that you have had since the fire a ledger which showed a credit to my account of over \$4,500; what you have done with the ledger, I don't

(Testimony of Henry B. Mayo.)

know. I have seen it since the fire. As a matter of fact, it should have been \$6,000 instead of \$4,500, but the books show I have paid in over \$4,500.

[172—81]

**[Testimony of H. Wernse, for Plaintiffs  
(Recalled).]**

H. WERNSE, being recalled, testified as follows:

Mr. HART.—Q. Mr. Mayo says that you had a ledger of these accounts including his own, that he examined and looked into since the fire. Is that correct?

A. I don't remember seeing a ledger since the fire.

The COURT.—Q. How would the ledger be destroyed and none of the other books be destroyed?

A. The ledger might have been out; they might have been at work on it.

Q. It is not a question of what might have been. I am talking about why a ledger, as valuable an adjunct to a set of books as a ledger, would be left out and the others all put in the safe?

A. The ledger is not as valuable a book as this cash-book and journal; they are the two most valuable books.

Q. You and I need not discuss that. I am asking you why it would be that a ledger would be left out and every other book put in the safe?

A. I don't know why it should be left out; I don't know.

Q. Is it a fact or not that the ledger existed until since the fire?



(Testimony of H. Wernse.)

A. I don't remember the ledger since the fire.

Q. You don't say it did not exist?

A. I don't say it did not exist; it may have existed. Mr. Mayo saw it. I did not see it, to my knowledge. If I did, it would be here.

Q. If it is in existence I would like to have it produced.

A. We can take these and post these up right away and show the ledger entries.

Q. It may not show the proper amount.

A. The ledger entries would not be made except from them. [173—82]

Cross-examination of H. B. MAYO resumed:

The WITNESS.—The ledger was written up to a certain extent as a book of original entry. There were a part of the entries in the ledger that do not appear in any other book. I don't remember the first time I saw that ledger, but I can remember seeing it since the fire because it was a large book like the others. I remember objecting to Mr. Wernse that my account showed a credit of only about \$4,600, when as a matter of fact it should have been \$6,000. That is all I know about it. The last time I saw it was since the fire. I think it was in Mr. Cutting's present office in the Monadnock Building, my recollection is. I could not be positive as to where I saw the book. I might be mistaken. I am referring to the ledger of the Monetary Trust Company.

Mr. HART.—I don't know anything about it. I have never seen it myself.

(Testimony of H. Wernse.)

The WITNESS.—(Continuing.) Mr. Cutting became the president of the Monetary Trust Company before the arrangements with Mr. Reichart were consummated.

Mr. WHITMORE.—The plaintiffs rest, if your Honor please.

**[Testimony of Fred Reichart, for Defendants.]**

FRED REICHART, called for the defendants and duly sworn, testified as follows:

I am the gentleman *who* name has been mentioned here by the witnesses as Fred Reichart. I reside at the present time at 1139 Leavenworth Street, San Francisco. My business is real estate and promoting. I have been engaged in that business about twenty-five years, and in San Francisco since 1891. I know the location of the present city of Richmond. I knew Mr. [174—83] Mintzer in his lifetime, and Mrs. Tuxberry. I had known them three years before the spring of 1904. I did their real estate business. They were owners of most all that land at Point Richmond. They were owners of a large amount of land, most all that land at Point Richmond. I remember about this property which afterwards became the property of the canal company that is called the Point Richmond Canal & Land Company. There were about 400 acres in that tract. It is what they call south of the tunnel at Point Richmond. The character of the land is overflow, marsh. I have done a great deal of business in Richmond.

(Testimony of Fred Reichart.)

The WITNESS.—(Continuing.) Mr. Mintzer was Mrs. Tuxberry's son-in-law. I had something to do with securing a contract on this property from Mr. Mintzer. That was about the 30th of June, 1904. No one else was interested with me in that contract. Mr. Mayo never had any interest in my contract. The contract was in writing. It was between Mr. Mintzer and me. I have not a copy of that contract; it was burned up in the big fire; I have no copy at all. I could not tell you whether the Mintzer people retained a copy of it that was not burned.

Q. What were the terms of the contract—I will ask you first if you can state in substance the terms of the contract?

Mr. HART.—Q. Were there two copies or only one?

A. It came in the shape of a letter, you see. It was mailed from Mr. Mintzer to me. I had been trying to get the thing in writing, and of course that covered several topics, but the thing had not been at this time thoroughly investigated by Mr. Tuxberry, and Mr. Mintzer put me off from time to time on that account, and my last word with him was when he got ready to put that in writing.

Mr. HART.—You saw the contract was finally signed?

A. Oh, yes, and sent to me by mail. I don't think there was more than one copy, because it was the same as a letter. I [175—84-85-86] don't know whether he kept a copy of his letter or not.

(Testimony of Fred Reichart.)

My copy of the letter was burned up in the fire of 1906. The Point Richmond Canal & Land Company was organized, I think, on July 14, 1904.

Mr. Hart here referred to the By-Law Book of the Point Richmond Canal & Land Company and stated that it showed that the by-laws were signed on the 14th day of July, 1904, by Frederick Reichart, A. N. Lewis, H. B. Mayo, H. W. Wernse and H. C. Cutting, as directors; also that the stockholders and the directors were the same 5 persons.

Whereupon said by-laws were admitted and considered to be in evidence for whatever purpose they might be worth.

The WITNESS.—(Continuing.) I have none of the letters that fix the terms of the transaction between the Tuxberrys and the Point Richmond Canal & Land Company. I don't know whether Mr. Mintzer retained copies or not. Mr. Mintzer is dead and Mrs. Tuxberry is dead, too.

Mr. HART.—Q. How much was to be paid for the property, Mr. Reichart?

A. Well, it was to be paid in the way of \$400,000 in bonds. I had an agreement with Mr. Mintzer that I was to receive—

The WITNESS.—(Continuing.) This agreement that I have in mind now, a part would be in writing and a part would not. The property was deeded to the canal company, upon delivery of the bonds, and I think on the 12th of September, 1904, there were altogether 800 bonds.



(Testimony of Fred Reichart.)

Q. Of \$500. each?

A. There was to be left as a separate trust \$67,000 in bonds, called construction bonds. The rest were delivered to Mr. Mintzer. There was no money whatever paid to the Tuxberrys by the Monetary Trust Company on account of this purchase. [176—87-88-89]

The stock certificate book of the Point Richmond Canal and Land Company was then received and considered read in evidence without objection.

Q. Well, now, what I want to know is can you state to whom the original stock was issued by the company without examination of the books?

A. Yes.

Q. To whom?

A. In the first place 1175 shares to the Monetary Trust Company. 200 to Dr. Lewis—250 rather; 50 to the board of directors, 2350 and 1175 to me; that is the way the books show, I believe. [177—90]

Mr. HART.—I notice here that the 1175 shares issued to the Monetary Trust Company was dated the 30th of March, 1905, and that is the first issue; that the total original stock according to this was issued on September 12, 1904, by the Point Richmond Canal & Land Company, and the transfer to the Monetary Trust Company was made on March 30th, 1905.

The COURT.—The witness is mistaken. He said that the first issue was 1175 shares—you are mistaken in saying that was a part of the first issue?

(Testimony of Fred Reichart.)

A. Yes.

Mr. HART.—I would like to call the Court's attention to the fact that the entire stock outside of the directors' stock was issued to Mr. Reichart.

The COURT.—He has testified so.

Mr. HART.—Except as to the 1175 shares.

The COURT.—Yes.

Mr. HART.—That is what I want to correct.  
[178—91]

Now, Mr. Reichart, you became a director in the Monetary Trust Company one time?

A. Yes. The reason I became a director in that company was, I was requested by Mr. Wernse originally to join the Monetary Trust and help boost the thing along. The way the 1175 shares came to be issued to the Monetary Trust Company, was upon a verbal agreement that they were to finance the Point Richmond Canal & Land Company, pay all bills of incorporation and issuing or getting up of the bonds and general development upon the ground, dredging and so forth, and at the same time they were to sell the construction bonds or as much as could be sold for the further development of the canal property. That was the understanding.

The COURT.—Q. Why were they to sell construction bonds if they were to furnish all the payments for the development of the land?

A. Because construction bonds would not sell until some start had been made and money expended upon

(Testimony of Fred Reichart.)

the property, which was continually most always under water.

Q. You must intend to modify your statement that they were to furnish all the money to develop that land.

A. Here is the verbal part of it, that had been talked of from time to time—that from eight to ten thousand dollars of the company's money should be put into the treasury in order to make these developments, dredging and so forth.

Mr. HART.—Q. Was there any estimates made of the amount required?

A. Well, I have always held out from eight to ten thousand dollars. The Monetary Trust Company did not furnish any money that I have ever seen, outside of paying for the incorporation and the expenses of printing the bonds; I suppose that bill has been paid. [179—92]

Q. How much did the Monetary Trust Company expend for the canal company?

Mr. WHITMORE.—I think the books of the company are the best evidence of this.

The COURT.—Yes.

Mr. HART.—Q. I will ask you: You were president of the Point Richmond Canal & Land Company during the time of the organization and the issuance and the delivery of the bonds, were you not?

A. Yes.

Q. I will ask you, during that time, what moneys, if any, were paid to your company or on account of your company by the Monetary Trust Company?

(Testimony of Fred Reichart.)

Mr. WHITMORE.—I object to the question on the ground it is not the best evidence.

The COURT.—The objection is sustained. [180—93—94]

[Testimony of H. C. Cutting, for Defendants (Recalled)].

H. C. CUTTING, being recalled for the defendant, testified as follows:

I am one of the defendants in this case.

There was neither a written nor verbal agreement between me and the Monetary Trust Company as to what I was to do or not to do.

The COURT.—There was no understanding at all?

A. As to what I should do for the Monetary Trust Company?

Q. Yes.

A. Not at all. They just came after me to buy some of their stock.

Q. And they made you president?

A. That was afterwards.

Q. You are the president of the Monetary Trust Company, and he is asking you if you had any contract with them. His question relates to the whole period.

A. I had no contract with them.

I was present as one of the organizers of the Point Richmond Canal & Land Company and I got 10 shares for that.

The WITNESS.—(Continuing.) Then as an interested member of the Monetary Trust Company I



(Testimony of H. C. Cutting.)

tried with Mr. Wernse as hard as I could to sell some of these bonds to develop the company, develop the land—some 60,000 odd dollars' worth of bonds that were left with the Central Trust Company for development purposes,—for the benefit of the canal company.

I bought some of those bonds from the Central Trust Company under a contract with Mr. Reichart.

(Here the following agreement was read in evidence without objection, and marked Plaintiff's Exhibit "A.") [181—94½]

Mr. HART.—(Reading:) "This agreement made this 3d day of May, 1905, by and between Fred Reichart of the city of San Francisco, State of California, as the party of the first part, and H. C. Cutting of the same place, as the party of the second part, Witnesseth: That said party of the first part is the owner of 2350 shares of the stock of the company known as the Point Richmond Canal & Land Company, which he agrees to assign and deliver to said party of the second part provided the said party of the second part has by the 1st day of October, 1905, purchased 27 bonds of the aforesaid company, and in trust with the Central Trust Company of San Francisco for the sum of \$10,125, as time hereof is the very essence of this agreement."

"In Witness Whereof, the said parties hereto have set their hands and seals the day and year first above written. Fred Reichart and H. C. Cutting."  
"Seal."

(Testimony of H. C. Cutting.)

The WITNESS.—(Continuing.) I finally took up these bonds mentioned in that contract or paper, Defendant's Exhibit "A." The money was paid into the Central Trust Company for the benefit of the Point Richmond Canal & Land Company. The Monetary Trust Company had nothing to do with it; they had failed on that contract.

The COURT.—Q. What contract do you refer to?

A. Well, they had some kind of an agreement that they were to sell these promotion bonds, and we tried to sell. I know I tried to get one or two parties and spoke to Mr. Wernse about one or two parties who might be interested in them, but they never succeeded in selling any; never succeeded in getting any money for development. [182—95—96—97]

I entered into no agreement whatever with the Monetary Trust Company for any bonds. How I came to have any dealings with the Monetary Trust Company in reference to the 1175 shares, I put in this \$10,125 into the Point Richmond Canal & Land Company. The money was expended on the land in dredging, and I was the only person that had put a cent into it. That was completed in October, 1905. Then in January, 1906, I went East and spent quite a bit of time in Boston, where I was acquainted, with one or two parties, and I tried there to raise some money to put into this proposition, but I could not do it. I returned here in March, 1906. I was in Tonopah at the time of the fire; in fact, up to that time most all of my time was spent in Tonopah; and then about July, 1906, I brought my family down here from Tonopah.

(Testimony of H. C. Cutting.)

The COURT.—Leave out all that detail and come down to the facts.

A. Well, then, the proposition came up as to doing something over at Richmond. I went after Mr. Reichart because he owned 1175 shares. He said he could not do anything with it. I tried to get Dr. Lewis to buy the stock of the Monetary, but I could not do that. I took Mr. Morgan over there and tried to get him interested in it and I could not do that. I was stuck with \$10,125 in there, so I told Mr. Reichart, "Well, here is the interest accumulating on these bonds and this thing will be wiped out in a little while, and we have got to do something." So after quite a bit of talk Mr. Reichart said—I told him that I would take what I had in it for mine and give him the stock. But he could not do anything with it. I made the same proposition to the Monetary Trust Company; they did not want it; they had no money. So I simply told Mr. Reichart and Mr. Lewis, "Well, if you are not going to do anything, I am [183—98] holding a bag; I want you to sell me your stock; if I have got to put this thing through, I want the stock."

The COURT.—What stock?

A. Of the Point Richmond Canal & Land Company.

Q. You had too much of it then, didn't you?

A. The other interests that held the stock would not do a thing, I should not carry them. I had about \$10,125.

Q. But you had gotten bonds for that; you were buying bonds?

(Testimony of H. C. Cutting.)

A. I would not have bought the bonds. I bought the bonds because I got the stock.

Q. Well, but I am trying to get at what call you had upon the Monetary Trust Company because you had taken under a contract with Reichart \$10,000 of the bonds of the canal company and that money had gone into the development of the land?

A. Why, I had no call on them.

Q. You were just now stating that you told them you were holding the bag and if they would not fish you would cut the bait?

A. That is it, exactly.

Q. I do not see the connection.

A. I will explain it to you. I did not have the control of the company. I had 2,350 shares. Dr. Lewis had 250 shares. Mr. Reichart had 1175 shares. The Monetary Trust Company had 1175 shares. Now, I did not care to buy any more of the bonds; I did not want the bonds; I could not sell the bonds. The proposition was of doing something, and in order to do something somebody had to put up some money. My proposition was, "Well, we will assess the stock." No, nobody wanted an assessment of the stock. There is no proposition in the minutes showing a motion to assess the stock, but it was talked of at the time, and Mr. Reichart did not have any money to put up, and his proposition was to sell me his stock at \$1.00 a share. Then I went for Dr. Lewis—no, he didn't want to [184—99] put any money into it, so I said, "Well, then, sell me your stock at \$1.00 a share." Then I took the matter up with the Mone-



(Testimony of H. C. Cutting.)

tary Trust Company, and I took the proposition up with Reichart to sell me his stock for \$1.00 a share. I bought the stock, his and Dr. Lewis's stock at \$1.00 a share, and then I wanted the Monetary Trust Company either to pay for their share of the development or sell their stock at \$1.00 a share. They would not stand for an assessment to put into this thing, so I made the same proposition to them, "Well, sell me the stock for \$1.00 a share," which they agreed to do rather than be assessed. Here is the agreement that I had with Mr. Reichart to buy his stock at \$1.00 a share and here is the agreement that I had with Dr. Lewis to buy his stock at \$1.00 a share.

Mr. HART.—Q. Is this the paper that you speak of as having an option to purchase Mr. Reichart's stock at \$1.00 a share?

A. Yes, there is an option on Mr. Reichart's 1175 shares of stock at \$1.00 a share.

Mr. HART.—We offer this in evidence. We ask to have it marked Defendant's Exhibit "B" and that it be considered read so as to save time.

The COURT.—Yes.

Mr. HART.—Q. Did you avail yourself of the option and take the stock?      A. I did.

Mr. HART.—Q. I will show you this paper. Is this one you received from Dr. Lewis?

A. That is the option I received from Dr. Lewis to buy his 250 shares at \$1.00 a share.

Mr. HART.—We offer it in evidence. It is dated November 6th.

The COURT.—Let it go in. [185—100—101]

(Testimony of H. C. Cutting.)

Mr. HART.—I ask that it be marked Defendant's Exhibit "C."

Q. To what extent did you try to sell additional bonds of the canal company? If you did not try, say so.

A. I tried. I did not solicit very much myself but I would suggest to Mr. Wernse someone that might buy these bonds. I tried very hard to get Dr. Lewis to come in, but, of course, the proposition never was for me to come and buy bonds of the company; the proposition was for me to come in and buy the other half of the stock.

Mr. HART.—Q. What I want to get at, Mr. Cutting, is, you spoke a few minutes ago in relation to an assessment. Why was it an assessment would have to be levied or why was it talked of when there were bonds for sale for developing the property?

A. You could not sell bonds.

Q. That is what I want to know. Now, to what extent?

A. I tried to get George Wingfield to come in and buy the other part of that stock, that is, the Monetary stock and the Reichart stock. I was not foolish enough to ask anybody to buy the bonds if they did not own any of the stock because they were of no account.

Mr. HART.—Q. Do you know that this land or property was included in the mortgage that secured these bonds?

A. Yes; that mortgage was dated, I think, sometime in the fall of 1904. [186—102]

(Testimony of H. C. Cutting.)

The WITNESS.—I took this matter up that I have spoken of in relation to the canal company about the spring of 1907. I made investigation as to the prices of real estate at Richmond and in the vicinity of this land, and of land of the same character—the Ellis land—I bought one-third of the Ellis estate. I have been acquainted with the selling price of land in Richmond since 1907.

The COURT.—He has not shown qualifications that would have any effect on me at all.

(An adjournment was here taken until Friday, November 20, 1914, at 10 A. M.)

Friday, November 20th, 1914.

Direct Examination of H. C. CUTTING resumed:

A. I made a trip over there and went around and I talked to the Bank of Richmond on the point, and there was Mr. Lucas had a real estate office over on the East Side; I talked with several real estate men regarding it. My object was to investigate the question of the value of this particular tract of land. I inquired as to what these gentlemen thought about it and I made inquiries as to the prices of adjoining land. I think I was over there two or three times, at different times. I was over there a good many times examining the land, as to whether it was feasible to do the things which we proposed to do. [187—103—104]

Mr. HART.—Describe it (the character of the land) to the Court.

A. Well, it was overflow land; it was bare; most of it was bare at low tide, but had rivulets and sloughs

(Testimony of H. C. Cutting.)

through it,—good deal like this marsh over here at the Estuary. It had a better foundation than most of that; salt marsh and tide land, as it was testified to yesterday here. We examined it very carefully. We bored down there to see what was down there, to see whether it could be dredged, and see what foundations there were, if it were prepared for use.

Q. Now, at that time did you form any idea from what you saw and what you learned from valuations generally, as to the reasonable value of this property?

A. Well, the property had no real market value unless certain things were done to it. At that time I was aware that there was a mortgage on the property given to secure \$400,000 of bonds, and I was also aware that about \$336,000 of bonds had been turned over to the former owners of the property. The other \$64,000 of the bonds at that time were in the Central Trust Company, in trust for the Point Richmond Canal & Land Company. They were the trustees under the mortgage.

Q. Now, then, what was the reasonable value of the shares of stock of the Point Richmond Canal & Land Company at that time and just previous to and at the time that you purchased these shares?

A. Well, the stock of the company had no value at all unless there was a lot of money spent on the property.

Mr. HART.—Q. Did you make estimates of the amount of money that would have to be spent on the property in order to make it of a value greater than



(Testimony of H. C. Cutting.)

the bonded indebtedness? [188—105—106]

A. Yes. I made such investigation for some time before I purchased the stock. When I say some time, I mean it covered the space of time during the investigation. For the purpose of making the property in a condition that would enhance the value of it at all above the bonded indebtedness, there would have to be a channel dug in there so that shipping could come in and then the property had to be filled so that it would be above the high water line; and of course it would ultimately have to be filled to the city grade, whatever the grade was established by the city. The grade or what is known as the base line had not been adopted at that time. Richmond was not incorporated at that time.

The WITNESS.—(Continuing.) I made an estimate of the expense of the making of this channel. I went over there a good many times, and figured on it—a lot of times—how to handle it, before I purchased the stock. I don't think I have ever figured it up exactly, the amount of money that has been spent on this property, but I should think in the neighborhood of \$150,000. I spent the money. The improvements that have been placed upon the property for this expenditure have been a canal cut for a distance of about 3,000 feet. There has been pretty near 100 acres filled in and one street 110 feet wide has been graded for 4,000 feet across the property and the sewers have been put in on some of the streets, and Richmond Avenue on one side of the property has been macadamized up in very nice shape, and then

(Testimony of H. C. Cutting.)

there have been some buildings—there have been two canals built, two side canals. It is a hard matter to estimate the present value of the property, I should think it is worth a million dollars. There has been a good deal of this 100 acres contracted for in lots. The books of the Point Richmond show the sales that have been made. No dividend has ever been paid upon the stock. There is still a bond issue out that is due the 1st of January, 1915. I think about [189—107—108] \$40,000 worth of bonds altogether have been paid and cancelled. The remainder are unpaid. They are due the 1st of January, 1915.

(A recess was here taken until 2 P. M.) [190—109]

**[Testimony of George S. Wall, for Defendants.]**

**AFTERNOON SESSION.**

GEORGE S. WALL, being called for the defendants and duly sworn, testified as follows:

**Direct Examination.**

I reside in Oakland; my business is real estate; I have been engaged in that business about 13 years at Richmond, Contra Costa County.

I am very familiar with the land called the Cutting land or the canal subdivision. I knew it some time before Mr. Cutting had anything to do with it. I would say it was marsh land, mostly.

I remember the time that Mr. Cutting took hold of that land. I have been actively engaged in the buying and selling of lands in Richmond during these 13 years. I am very familiar with the prices and have

(Testimony of George S. Wall.)

been at the different periods of time. I should say that the particular tract of land known as the canal subdivision including the whole 406 acres, in January, 1905, should have been worth from \$350 to \$400 an acre. The market value could not have increased in September, October and November of 1906 very much that I can see.

I am familiar with the improvements that have been made so far on about a hundred acres of the land.

The reasonable value of the land at the present time, taking the land on which the improvements exist and the portion that is not improved, compared with other lands that have been sold on higher levels, I would say was not over \$1,200 to \$1,500 an acre.  
[191—110]

Mr. HART.—Q. What would you say was the value of the land, the reasonable value of the land at the time of the filing of the original bill in this case, on the 19th of February, 1913?

A. I don't think there has been much change in values during that time.

Q. Considering that this particular land, we will say, belonged to the Point Richmond Canal & Land Company, and on which that company had executed a mortgage and given bonds to the par value of \$400,000, to run 10 years from the 1st of January, 1905, and becoming due on January 2d, 1915, and drawing interest at 6%, what would you say that that land was worth, if anything, in excess of the bonds, in the fall of 1906?

(Testimony of George S. Wall.)

Mr. WHITMORE.—I object to the question first on the ground that it assumes that the bonds were issued for \$400,000, and that it appears that the company had 67,000 of these bonds—

Mr. HART.—66,000.

Mr. WHITMORE.—\$66,000 of those bonds, or 132 bonds, and that the mortgage indebtedness actually existing as against the company was only \$333,000 or \$334,000.

The COURT.—The objection is sustained.

Mr. HART.—Q. I will ask you now: Supposing that there was issued upon that mortgage \$336,000 of bonds instead of \$400,000, then what would you say was the value of the property over and above the mortgage in the fall of 1906?

A. I don't think it had any value at that time.

Mr. HART.—Q. You know of several corporations that have been dealing in lands in Richmond during these 15 years?

A. Yes. I have had one or two of my own.

Q. Taking into consideration that this land had been deeded to the Point Richmond Canal & Land Company, and that it was [192—111] subject to that incumbrance of \$336,000 in the fall of 1906 of bonds maturing January 2, 1915, and drawing 6% interest, what would you say would be the value of those shares at that time, considering the incumbrance?

Mr. WHITMORE.—I object to the questions upon the ground that it does not appear that this witness is competent to answer as to the shares of stock,—im-



(Testimony of George S. Wall.)

material and incompetent.

The COURT.—The objection is sustained.

Mr. HART.—Exception.

The WITNESS.—I am not familiar with any sales of the stock in these land corporations at Richmond.

The value of the stock would depend entirely upon the question of the profits that would be made—absolutely.

Upon cross-examination, the witness testified as follows:

I don't know the exact date when these improvements were put upon this property. I do not know how much was expended to improve the property, or how much of the property has been reclaimed, as it were.

In my answers I did not take into consideration any of the improvements at all.

Mr. WHITMORE.—Q. Then your answers to those questions are based on the condition that the land was in 10 years ago regardless of improvements?

A. I cannot say that it was entirely. The first valuation was. I don't know the amount of money that has been expended nor the amount of land that has been reclaimed or filled, or the added value of that work upon the property. I am not familiar with it. The city of Richmond has not done any filling upon this land, that I know of. I don't know; I am not familiar with that. I am not interested in this land.  
[193—112] I am not interested in business in any

(Testimony of George S. Wall.)

way with Mr. Cutting. I am a friend of his. I came here at his request.

The way I base values of the land,—I would place it at the valuation marked on the lots unsold, less commissions and expenses, marked by the company.

Q. Have you been testifying from the manner in which the company has marked their land for sale?

A. It is of no value until it is sold.

Mr. WHITMORE.—Q. Supposing they sold less than 20% of the land for \$40,000 in the spring of 1907, would that make any difference in your estimate of the value of the land?

A. It would depend upon the parts of it sold; some of it is more valuable than other parts.

I presume this land is valuable because of its proximity to the deep water; but there is no deep water adjacent to it at the present time. There is a canal partly dug in it—said to be a ship canal, but it is not very deep at the present time—not for very large ships.

On redirect examination the witness testified as follows:

I don't know how wide it is. I should say 80 feet, guessing at it. The portion that was improved is the 100 acres which lies next to the tracks of the Santa Fe Railroad. [194—113] I certainly would consider that 100 acres proportionately of greater value than the other 300 acres.

I have been over that 100-acre tract off and on for the last 10 years. I know where Ashland Avenue is; that is the northern boundary of the property. They

(Testimony of George S. Wall.)

have been filling in that portion of the property to make it saleable.

In my last valuation of \$1,200 to \$1,500 an acre, I considered the whole tract as one tract.

Direct examination of H. C. CUTTING, resumed:

Mr. HART.—Q. State whether or not, before we go into another subject, provision has been made for the payment of these bonds when they come due the 2d of January, 1915?

Mr. WHITMORE.—I object to that as immaterial and irrelevant.

The COURT.—The objection is sustained.

Mr. HART.—An exception.

The WITNESS.—(Continuing.) I spent something over \$50,000 upon this property before I commenced offering any of it for sale.

I think I saw both of the Woodwards once, the complainants in this case.

Mr. HART.—Q. I now call your attention to page 32 of the minute-book which has been, I believe, read in evidence, in which minutes the following appears:

“Mr. Wernse of the executive committee, being the only member of said committee present, offered for *ratification approval*, the following option given to H. C. Cutting; and upon motion of Mr. Wernse, seconded by Mr. Betz, was approved [195—114] by the following votes: H. W. Wernse, representing 505 shares; W. J. Morgan, representing 65 shares; Albert Betz, representing 55 shares; H. C. Cutting (H. W. Wernse, proxy) 753 shares; being more than a majority of the shares issued.

(Testimony of George S. Wall.)

On motion of H. W. Wernse and seconded by Albert Betz, all actions of the board of directors and its officers since the last stockholders' meeting, to date hereof, were unanimously ratified, approved and confirmed."

Do you at this time remember about that option?

A. Yes. It was written on a piece of legal-cap, that is, typewritten. The option was not signed by me. I don't know whether it was signed by Mr. Wernse or Mr. Betz or Mr. Morgan. I don't remember. I could not find my copy of that document. This option was given to me. The occasion for making the option originally was that there was nothing doing with the Monetary Trust Company; it had not done anything; we could not do any business; we could not get any money. I had put up \$10,000 for the Point Richmond Canal & Land Company, \$10,125. I was the only one who had put any money into it, and when I came down from Tonopah, about July, I talked the matter over with Mr. Reichart and saw Dr. Lewis several times, and I saw Mr. Mayo and talked to him, and there was no chance of getting any money into the proposition; so I told these gentlemen, "If you do not want to do anything"—I told him, "Well, I have got \$10,000 in here, and I have got to either put more in and carry the thing through or I have got to lose what I have got in, or a good part of it, and it might as well be lost, because it would take us a long time to get anything out of these bonds; so Mr. Reichart said he had no money to go ahead with, and I told Mr. Reichart that I would sell him [196—



(Testimony of George S. Wall.)

115] all of my bonds.

Mr. HART.—Q. What was the result of this option, Mr. Cutting? What was done?

A. Well, I offered a give or take proposition to every stockholder of the Point Richmond Canal & Land Company, if they would give me my money. They gave me an option to purchase it.

Q. Who did? “They” is very indefinite. Who did?

A. The directors at that meeting on November 10th, 1906—

Q. (Interrupting.) There does not seem to be any option there. What was the option?

A. They gave me a written option to purchase the 1175 shares.

Q. “They” gave you. That is indefinite. I want to know who you got that option from, and if it was by the corporation or by individual members outside of the meeting.

A. It was passed at that meeting that is reported in that book, this option was passed at that meeting.

The COURT.—“That meeting”—These minutes simply purport to ratify an option previously given, That does not purport to give you an option at all.

A. I think your Honor is mistaken about the meeting of November 10th.

Mr. HART.—Q. These minutes, Mr. Cutting, of November 10, 1906, state that “Mr. Wernse of the executive committee, being the only member of said committee present, offered for ratification and approval the following option given to H. C. Cutting.”

(Testimony of George S. Wall.)

The COURT.—You see that relates to an option purporting to have been executed before, and that is what he is asking you, who executed that option,—how did you come to get it? [197—116]

A. General Hart drew the option and I think it was signed by the General and Mr. Wernse as the majority of the executive committee.

Q. What executive committee are you talking about? A. Of the Monetary Trust Company.

Q. Is there anything in the minutes about an executive committee? [198—117]

The WITNESS.—They gave me an option to purchase it at the same price that I purchased the rest of the stock or had options to purchase the rest of the stock, because they did not want the company assessed.

Mr. WHITMORE.—I object to the contents of what it was until they produce the original, as the best evidence.

The COURT.—Yes, the original must be produced or accounted for.

Mr. HART.—Q. When did you see that option last—that is, the document I will call for?

A. There was a copy of the option in that book within the last 15 months. I do not know what became of it. The last I saw of it, I took it up to your office to show it to you, and then it was in the book when it was brought back because I showed it to Mr. Wernse. I don't remember whether that option was formulated in more than one copy. I had a copy and I saw that one in the book. I could not say whether

(Testimony of George S. Wall.)

it was my copy of the option that was in the book or whether it was another copy of the option. I do not know whether there was one copy made, or one original and a copy or more than one original. You made up the option.

Q. Well, now, I notice here on the minute-book, page 33, the following minutes: "Meeting of the directors of the Monetary Trust Company, called this 20th day of December, 1906, at 12 o'clock noon, present: H. C. Cutting, W. J. Morgan, H. W. Wernse.

Absent: Albert Betz, H. B. Mayo.

On motion of H. W. Wernse and seconded by W. J. Morgan and carried unanimously: H. C. Cutting was elected president; [199—118] W. J. Morgan, vice-president; Albert Betz, secretary; H. W. Wernse, cashier and trust officer.

Mr. H. W. Wernse presented the check of H. C. Cutting for \$1,175, stating that Mr. Cutting desired to exercise his right under the option given him by the Monetary Trust Company, ratified and confirmed by the stockholders at their last meeting, to purchase 1175 shares of Point Richmond Canal & Land Company stock held by the Monetary Trust Company at \$1.00 per share.

On motion of W. J. Morgan (under the advice of the chief counsel), and carried unanimously, the cashier was ordered to deliver to H. C. Cutting the certificate for 1175 shares of Point Richmond Canal & Land Company stock for \$1,175 as per the option.

(Testimony of George S. Wall.)

There being no further business, the meeting adjourned.

Albert, Betz, Secretary."

I will ask you to state to the Court if that meeting was held at the time specified in this minute-book.

A. That meeting was held at that time. I was there. I don't know anything personally in reference to notice having been given to the others—not of my own knowledge. I gave my check for \$1,175—\$1.00 a share for 1175 shares. [200—119]

The WITNESS.—I spent most of the night, last night, looking for it. I could not find it. I went through everything over at my house, all the papers that I could think of. In 1906, I had my place of business out at 925 Golden Gate Avenue, in a room next to your office. (Mr. Hart's.) No, at this time I had a desk in your office at 925 Golden Gate Avenue.

I spent the majority of my time in Tonopah up to the spring of 1907.

I have requested Mr. Wernse and Mr. Betz to find this option.

Q. What report did they make to you, if anything, on that subject?

Mr. WHITMORE.—I object to that as immaterial and irrelevant.

The COURT.—The objection is sustained to your inquiry.

Q. I will ask you now whether you gave a check for this as stated *herein* the minutes. A. I did.

The WITNESS.—(Continuing.) I do not remember what bank it was on; I did business with the State



(Testimony of George S. Wall.)

Bank & Trust Company and the Ormsby County Bank in Tonopah—I don't know whether I was doing business with the Wells, Fargo Nevada National, the First National, or the American National down here.

Q. I am speaking now of the month of December, 1906.

A. I could not recall. I have examined to see if I can find that check. I have tried to find it. I have not been able to find it; I could not find any checks or check-books that were used before we moved down to the Monadnock Building, where I now am; at that time I bought a new desk and some filing cabinets and had places to put things but up to that time I only had a desk out in your office and I had [201—120] no place to put them; to take care of them. I have no checks at all previous to the time that I established my offices in the Monadnock Building. I don't think I have a check previous to that time.

“What have you got to say about the question whether this check was ever paid or not?”

The COURT.—He wants to ask you if you know whether the check was ever paid or not.

A. I don't know whether the check was paid or not. I drew hundreds of checks at that time. I never followed them up to see whether they were paid or not.

I don't have my checks returned unpaid. I don't draw a check unless there are funds in the bank to pay it.

Mr. WHITMORE.—I ask that that be stricken out.

(Testimony of George S. Wall.)

The COURT.—Let it go out. Answer the question.

Mr. HART.—Q. Did you have money in the bank on which the check was drawn sufficient to meet it?

A. I certainly did.

I never had any office at 79 New Montgomery Street, at the Crossley Building. The Monetary Trust Company had an office there. After I was president of it, there was a little desk in the back office. I was there very little. I was up at Tonopah most of the time during these times.

Q. State whether or not you had any conversation with Mr. Mayo in reference to the transaction of putting up money for financing the Point Richmond Canal & Land Company? [202—121—122—123]

A. Do you mean before or after the fire?

The COURT.—He means at all.

A. I had a talk with him after the fire, but before the fire I never told him that I would finance the company or anything of the kind. The proposition of financing the Monetary Trust Company was that Mayo and I were to put up the money to pay the expenses of the Monetary Trust Company, and if some business were found that would justify it, we were to pay in the balance of the subscription for 500 shares of stock apiece. That is the only conversation that I ever had regarding it. I never had any talk with Mr. Mayo at all in reference to the purchase of the bonds of the Point Richmond Canal

(Testimony of George S. Wall.)

& Land Company. Mr. Mayo did not have anything to do with the bonds of the Point Richmond Canal & Land Company after the Monetary Trust Company had failed to sell these bonds.

I purchased the first 27 bonds between May and October, 1905.

Q. I notice that this contract of Mr. Richarts that you spoke of being Defendant's Exhibit "B," is dated the 29th of August, 1905. Had you bought any bonds previous to that time?

A. Yes; I bought the \$10,125 worth of bonds; that is, 27 bonds, at 75 cents on the dollar—I bought those bonds between May and October, 1905. The money was expended in taking out the first cut in that canal.

Q. That, then, was the same 27 bonds that was mentioned in Exhibit "A" under the instrument dated the 3d of May, 1905?

A. That was the contract under which I purchased the bonds. The Monetary Trust Company had nothing to do with it. [203—124—125]

Mr. HART.—Q. Now, Mr. Cutting, what business did you do, if any, in the office at 79 New Montgomery Street?

A. I did not do any business except as called upon by the Monetary Trust Company.

Q. Did you have a desk there?

A. Yes, there was a desk in the back room. It belonged to the Monetary Trust Company. After the fire the Monetary Trust Company moved its

(Testimony of George S. Wall.)

offices up to 925 Golden Gate Avenue. That company did not have any furniture there. I think the furniture was your furniture that was there. I do not believe there was anything that belonged to the Monetary there. I don't think the Monetary Trust Company paid any rent after the fire; I think they paid Mr. Wernse his salary up until probably all of 1906—I don't know—they paid him some salary.

The Monetary Trust Company keeps its books at my office at 779 and adjoining rooms in the Monadnock Building.

Mr. HART.—Q. Were there any charges made against that company for office rent since the fire of April 18th, 1906?

A. Not that I know of. I did not come down here until sometime in July, 1906.

The Monetary Trust Company has not bought any furniture or furnished any furniture at the Monadnock Building for me; I don't know of any they have bought.

I am admitted to the bar as a lawyer; have taught school in Nevada, and was State Superintendent of Public Instruction for four years. [204—126]

[Testimony of H. W. Wernse, for Defendants  
(Recalled).]

H. W. WERNSE, being recalled as a witness for the defendants, testified as follows:

I am the gentleman that has been mentioned here in these minutes as "H. W. Wernse."



(Testimony of George S. Wall.)

I do not know where that option paper is. I last saw it some time after this suit was started. It was in the minute-book lying loose. These minute-books were examined by Mr. Cutting and Mr. Mayo and Mr. Clayburg, Mr. Whitmore and yourself (referring to Mr. Hart). I do not know where that option is now. I did not take it out of the books. I only saw one copy. I never saw more than one copy. That was the one I signed. Yourself and myself signed that option.

Mr. HART.—Q. Who composed that executive committee?

Mr. WHITMORE.—I object to that as immaterial and irrelevant [205—127] and not the best evidence of who composed the executive committee.

The COURT.—The objection is sustained.

Mr. HART.—Exception.

Q. Have you made a search for that document since you saw it here?

A. I searched the books; that is the only place I could look for it. I have searched among the papers of the Monetary Trust Company; I have not been able to find it; I could not repeat its contents, but I know what it contained. That document was in the books and it was accessible to every one who looked at it.

The COURT.—Q. Now, was it in the book, pasted or pinned, or how?

A. It was lying loose in these minutes there; it might have been pasted and torn loose.

(Testimony of H. W. Wernse.)

Q. You can tell whether it had been pasted there or not?

A. I have not examined it for that purpose.

Q. Don't you remember whether it was pasted in there, or not, or fastened in any way?

A. When this suit was started, I opened the book and found it loose, and I did not change it at all.

Q. It was not fast, then?

A. It was not fast, no.

Mr. HART.—Q. Are you able to state its contents? A. Yes.

Q. In substance? A. Yes.

Q. Well, state what it was.

Mr. WHITMORE.—I object on the ground it is immaterial, irrelevant and incompetent.

The COURT.—You have not laid any foundation for it, General, to state its contents.

Mr. HART.—I think I have gone as far as I can.

The WITNESS.—I was secretary of the company and had the option. [206—128]

Q. Of the Monetary Trust Company—I am speaking of the Monetary Trust Company.

A. In the possession of the secretary?

Q. Yes.

A. It was in the book; the book was in the office. The only time that the secretary had the book was when he came down to the meetings.

Q. Who had charge of the book—that is, who kept the book?

A. The secretary kept the book, Albert Betz. He wrote the minutes up. When the book was not in

(Testimony of H. W. Wernse.)

his possession, it was left in the safe in my office. I have looked for this option and cannot find it.

**[Testimony of Albert Betz, for Defendants  
(Recalled).]**

ALBERT BETZ, being recalled for the defendant, testified as follows:

I have a very incomplete recollection about this option being in that book, and that is all. I had not the book except when I came down to the meetings.

Mr. HART.—Q. In other words, the possession of the books was retained by Mr. Wernse in the office?

A. They were always there. The minutes were written up by me. I have not got this option and never did have it.

**[Testimony of H. W. Wernse, for Defendants  
(Recalled).]**

H. W. WERNSE, being recalled, testified as follows: [207—129]

Mr. HART.—Q. Mr. Wernse, please state to the Court the contents of this option referred to in these minutes?

A. It was an option giving Mr. Cutting the right to purchase—

Q. (Intg.) State the language as near as you can.

A. Well, that is a very hard thing for me to do. I did not dictate the option. I read it over a number of times. It gave Mr. Cutting the right to pur-

(Testimony of H. W. Wernse.)

chase 1175 shares of the Point Richmond Canal & Land Company's stock, which was the stock of the Monetary Trust Company, for \$1.00 per share. It was signed "Monetary Trust Company, by Wm. H. H. Hart" and "H. W. Wernse, members of executive committee." That is the document that is referred to in the minutes.

Mr. HART.—Q. State whether or not the document that you have just referred to was the one mentioned here in the minutes of November 10, 1906?

A. Yes, it was the only option we have ever given on the stock.

On cross-examination the witness testified as follows:

I think the date of the option was September, 1906. The time within which he could execute the option, as provided in the option, was, to the best of my knowledge, about six months. I believe there was a space of time specified. I think the option was executed the day that one of these minutes appears [208—130] dated, September 3d.

The COURT.—Q. Was this option executed at a meeting of the directors?

A. No, at a meeting of the executive committee.

Q. Where was there an executive committee?

A. A meeting was held.

Q. Who created the executive committee?

A. Mr. Cutting and Mr. Hart.

Q. Who created the executive committee, I say?



(Testimony of H. W. Wernse.)

A. The by-laws.

Q. Where is there anything in the minutes as to who appointed the executive committee?

A. If I had the minute-book, I could tell you.

(Mr. Hart hands minute-book to the witness.)

The WITNESS.—“Here is the motion. “On motion duly made and seconded, H. W. Wernse was appointed third member of the executive committee until the further order of the board.” I am looking back to see who composed the executive committee, who were made members of the executive committee. I do not find anything before that. I just find this one motion.

Mr. HART.—Q. Mr. Wernse, where is the by-law book of the Monetary Trust Company?

Mr. CLAYBURG.—Here it is.

Mr. HART.—Q. Do you find anything there in reference to the executive committee?

A. Only the motion I have just read to his Honor. There is nothing in the first minutes of the meeting of the organization that appoints an executive committee until that motion appointing Mr. Wernse the third member.

Q. I call your attention to Article Xa—this has been offered in evidence, your Honor. Section 1 reads: “For the purpose of facilitating the conducting of the business of this company, [209—131] there shall be appointed by the board of directors an executive committee of three persons. 2d. The president and chief counsel of the company shall constitute two of said committee, and the board of

(Testimony of H. W. Wernse.)

directors shall select the third member of said committee from their number, or may select such other person as may be deemed for the best interest of the company. 3d. Said committee shall have full charge of and shall conduct and carry on the business of the company, and report its actions to the board of directors at the meeting of the board held next thereafter."

The COURT.—That would show the president and the attorney were the other two members of the executive committee and you were appointed the third one. The president and the attorney were standing members ex-officio of that committee.

Mr. HART.—Yes.

Q. Who was chief counsel of the company at that time, Mr. Wernse, myself?

A. Yes. Mr. Cutting was president of the company, and I was appointed the third member of the committee.

Mr. WHITMORE,—Q. Do you now recall the date on which this option was executed? You have the minute-book?

A. No, I don't know the exact date. It was in September. The executive committee reported to the board of directors what action they had taken. They reported on November 10, 1906.

Q. Just read the report. That is a stockholders' meeting, or directors' meeting?

A. Stockholders' meeting.

Q. I did not ask you about a stockholders' meet-

(Testimony of H. W. Wernse.)

ing. Did they ever report to the board that they had given an option?

The COURT.—This was not an executive committee of the stockholders, but an executive committee of the board of directors. [210—132]

On redirect examination, the witness testified as follows:

Mr. HART.—Q. As a matter of fact, in your actions in the board of directors at all times, were you present at the meetings where it was designated in the minutes?

A. Yes. I was elected a director of the Monetary Trust Company. I was elected a member of the board by the stockholders. Mr. Cutting did not at any time request me to vote in any particular manner. I acted independent, on my own volition and mind, at all the meetings.

Q. How did it come about that the 1175 shares were sold for \$1 per share?

A. The stock of Mr. Reichert and Mr. Lewis was bought at that price.

Mr. HART.—Q. What had that stock cost the Monetary Trust Company, if anything?

Mr. WHITMORE.—I object to that question as immaterial. It makes no difference what it cost.

The COURT.—The objection is sustained.

Mr. HART.—Q. Do you know why the executive committee made the option to Mr. Cutting for \$1175, on what they based their judgment? If so, state.

A. They discussed the matter of paying an assess-

(Testimony of H. W. Wernse.)

ment to carry on the work or selling the stock.

The COURT.—Q. Mr. Wernse, why was a transaction of this kind carried through, assuming just for the moment that it could be legally carried through, where one of the three present was one of the interested parties, without the presence of the other directors of this corporation, Mr. Mayo and Mr. Betz?

A. We deemed it for the best interests of the Trust Company to dispose of it. They were sent notices to appear and they did not appear. I sent notices out as I was directed at this time. The secretary was not here. He was in Napa, living there. The directors were notified and they were consulted about it when they came in. They did not come to the meeting. They were in [211—133—134] at different times.

Recross-examination.

Mr. WHITMORE.—Q. You say that they talked of on assessment on the stock of this company?

A. Yes.

It is not true that at the time I knew that Mr. Cutting had 753 shares of stock that presumably had been purchased at \$10 a share and had only paid \$1,825 on it.

Q. Had he paid any more?      A. Yes.

The WITNESS.—I think if the books of the company were taken and gone through and posted up, you will find he has paid for his stock.

Q. You footed it up the other day and said it was



(Testimony of H. W. Wernse.)

\$1,825, didn't you?

A. I didn't say that was what he paid.

Mr. WHITMORE.—That being the case, Mr. Cutting had not paid up the subscription on this stock at the time that you gave this option, and that you were talking of assessing the company or getting money into the company?

A. I am not so sure that all those items were read. If [212—135] the journal and the cash-book were both gone through, you could arrive at the exact amount that was paid in, because those are the two books in which the original entries were made.

Q. What were you talking of assessing this company for when immediately upon getting this \$1,175 you loaned it back to Mr. Cutting and did not use it?

A. We did not loan it to him until six months thereafter.

Q. Didn't you loan it to him the very day that this transaction was consummated or pretended to be consummated?

A. I would not say I did, because we have a note for it.

Q. When you took his note for it, where did you get the money?

The COURT.—Well, I think that has been gone into sufficiently. I should find upon the evidence as it is thus far developed, that that check never was cashed at all. It was turned back to Mr. Cutting and his note taken for it.

Mr. WHITMORE.—Very well, that is all.

(Testimony of H. W. Wernse.)

On redirect examination the witness testified as follows:

I have my office adjoining Mr. Cutting at the present time. I have had my office there since 1908, that is, in the Monadnock Building; we moved from the 9th floor down to the 7th floor, about three years ago. None of the furniture in any of those offices in the Monadnock Building is the furniture of the Monetary Trust Company.

The Monetary Trust Company has not been paying salaries since the removal to the Monadnock Building. None of the furniture or expenses have been paid for by the Monetary Trust Company.  
[213—136]

**[Testimony of Albert Betz, for Defendants  
(Recalled).]**

ALBERT BETZ, recalled for the defendants, testified as follows:

I was a director in this company for a good many years. In acting as a director, I acted upon my own judgment and views. I voted according to my best judgment as I understood the situation. I don't recall having any conversation with Mr. Mayo as to this sale or stock transaction. I could not state now how soon after this 1175 shares of stock were sold I ascertained the fact. I have heard the matter of the sale generally discussed. I heard it talked of after the sale. I could not positively state whether or not the matter was discussed in the presence of Mr. Mayo; I don't remember that.

(Testimony of Albert Betz.)

On cross-examination the witness testified as follows:

I never had a share of stock in this company. I have a certificate for 55 shares. I paid no money into the company for those 55 shares of stock. I got it by working for the company. I suppose that was my compensation for work for the company. I acted as secretary; that was practically all the work I did. The stock was given to me at the time of the organization of the company.

The COURT.—Not 55 shares at the time of the organization. How did you get the 55 shares afterwards?

A. I could not tell positively how I did get them.

The COURT.—Q. Who does it belong to?

A. It belongs to me.

Mr. WHITMORE.—But you never paid in any money. A. No.

Q. Didn't you go into this company at the request of General [214—137] Hart, to form one of the board of directors, to accommodate him?

A. No, I did not.

Mr. WHITMORE.—Then, you were in there as an accommodation to the other people, were you not?

A. Possibly they so considered it. I thought it was a good thing for me also.

The WITNESS.—(Continuing.) I took no part in the conduct of the business, except to come down as secretary sometimes. That is about the only time I was in the office. I lived here at the time that this company was organized, and for several years. I

(Testimony of Albert Betz.)

attended the meetings and acted as secretary; that was all. When they wanted to put anything through, after it was all discussed, I helped to put it through. I had an interest in it to the extent of 55 shares. I did not have anything to do with the conduct of the business in that way, but I did in this way, that I supposed that every action taken for the interest of the company was for my best interests also. Mr. Cutting never asked me to do a certain thing.

Q. You did not interfere; whenever General Hart and Mr. Cutting suggested a thing, it went, didn't it?

A. No.

Q. Did you ever vote against any proposition that was presented to the board?

A. I could not state that unless I looked over all the meetings; all the minutes.

The COURT.—You have no recollection of having voted that way? A. No. [215—138]

On redirect examination, the witness testified as follows:

Mr. HART.—Q. Did you receive any salary or compensation from the company other than stock for your services?

A. No, except, I will qualify that, some meetings ago there was allowed \$5 for attending a meeting.

**[Testimony of W. J. Morgan, for Defendants.]**

W. J. MORGAN, called for the defendants and duly sworn, testified as follows:

I am the gentleman who is mentioned in the minutes as W. J. Morgan. I know Mr. Cutting, Mr. Wernse, Mr. Betz and yourself (General Hart). I



(Testimony of W. J. Morgan.)

was also a director of this Monetary Trust Company at one time. My business is that of real estate. I have been in that business about fifteen years. I know this property known as the Canal Division in Richmond. I first saw the property along in 1904, I believe. I presume I have been there half a dozen times. I know something about the values of property at Richmond in a general way—not very familiar with it. I am not very familiar with the property; I never operated there. I am familiar in a way with the acreage prices in Richmond. I at one time thought of buying some property over there and went over and looked at it several times and had prices quoted to me and fixed in different localities. I have been dealing in real estate down the peninsula. I went over the land once I think in 1906, and at that time, of course, it was marsh, and we had a good deal of difficulty in getting over it, but I formed an opinion of the property, that is, if dredging work was done, etc., the property could be put into shape, it could be made a splendid division, net a great deal [216—139] of profit.

On one occasion I made inquiries of prices of land at Richmond; I went over there looking for a subdivision and was shown some property; the prices were quoted to me. In that way I got a general idea of the prices prevailing in the vicinity. I think that was about two years ago, as near as I can remember. As early as 1906 I had not made sufficient examination to determine values of property.

With reference to this transaction of Mr. Cutting's

(Testimony of W. J. Morgan.)

with the Monetary Trust Company—in reference to these 1175 shares—I remember that the matter was discussed with me and with other members of the company, in regard to selling the stock, and, as near as I can remember, we agreed to sell the stock at \$1 a share.

Q. When was this arrangement made that you have just mentioned?

A. Why, it was talked over generally among the parties interested, as I understood, all of the directors, before the meeting, and I think \$1 a share, as I remember, was the price that Mr. Cutting offered, and that was the price that was agreed upon.

Q. Was Mr. Mayo present at any of the conversations?

A. I cannot recall whether Mr. Mayo was present when this talk [217—140] was had with reference to the stock or not. I have no recollection.

The WITNESS.—(Continuing.) I could not see why the price was fixed at \$1 a share, except that Mr. Cutting offered \$1 a share. At that time I did not consider it a reasonable price for the stock, in view of the fact that at that price per share I would not near get out the money that I had put into it, but under the circumstances I agreed to it. I mean by the circumstances, with the unsettled condition of the affairs of the company, etc., I felt that while I would not be getting out whole on the proposition, that probably it was the best that could be done, and I was busy with other matters and my interests were not very large, so I just agreed to it and let it go. I

(Testimony of W. J. Morgan.)

paid half of the rent, as I remember, of the office of the Monetary Trust Company; that was paid directly to the corporation. The corporation, I believe, was paying \$150 a month—I think they started to pay \$135, and I believe a little later that the rent was to be \$150—I paid \$75; that is my recollection of it.

The COURT.—That is \$75 toward the rent and then your half of any other expenses, I suppose?

A. Well, no, I did not—

Q. (Intg.) I notice that several months you paid as high as ninety odd dollars; that must have been for other expenses, was it not, besides rent?

A. No, I was paying half the rent. I was carrying on a separate business—while I was an officer of the company I had other business of my own, and that is the reason I paid half of the rent. I don't know what these other items could have been making it \$90; it might have been for something that I had done in the office, maybe some stenographic work, or something like that.

Q. Perhaps you paid your share of the telephone service? [218—141]

A. I guess that was probably it.

There was talk of an assessment. I remember Mr. Cutting stating that something had to be done over at Richmond, with the property, and that if the Monetary Trust Company could not put up any money with which to carry on the business, they had better sell the stock to him and he would put more money into the thing and *and* go on with it. The assessment spoken of, I presume, was that Mr. Cutting stated it

(Testimony of W. J. Morgan.)

would be necessary for the Monetary Trust Company to pay an assessment or raise money to carry on the business over there, if they went on with the business. At that time my recollection is the Monetary Trust Company had 1175 shares of stock in the Point Richmond Canal & Land Company, or a little short of a quarter of the stock. I decided, so far as my position was concerned as a director, that the most feasible thing for the Monetary Trust Company to do in regard to that matter was to sell the stock. I acted on my judgment in that regard.

The COURT.—Was he one of the directors that was present?

The WITNESS.—Yes.

Mr. HART.—Q. Then, as a matter of fact, in making that, in passing that resolution to accept the proposition to sell to Mr. Cutting for \$1,175, you acted on your own judgment? A. I did.

Q. And not on his at all. The minutes show that Mr. Cutting was present, and Mr. Wernse. Is that correct—at that meeting?

The COURT.—Have you any independent recollection about it?

A. Yes, I remember Mr. Cutting and Mr. Wernse being present, and that the matter was taken up and disposed of at that meeting.

Q. Do you know whether or not Mr. Mayo had any knowledge of this transaction at all—what I mean is, have you had any conversation with Mr. Mayo at any time since that meeting as to the [219—142] question of this transaction?



(Testimony of W. J. Morgan.)

A. No, I never had any conversation with Mr. Mayo until this suit, I believe, was commenced. I have no recollection of having any talk with Mr. Mayo until the beginning of this action.

On cross-examination, the witness testified as follows:

I had 65 shares of stock in this company. I sent a check to General Hart for it. At the time I bought the stock I was living in Sacramento. I never knew where it came from, whether it was company stock or whether it was the General's stock; I simply sent the check and received the stock.

The COURT.—Q. How much was the check?

A. I sent a check, if my recollection is right, for \$160.

I was acting in the capacity of vice-president, and occasionally, when the *present* was absent, of course, I acted in his stead. I was present, I believe, at most of the meetings that took place. I had my office in the same room, and consequently was there. Mr. Wernse was the active officer of the company. Propositions were brought in—as I say, Mr. Wernse was the active officer in the company, and looked out for the business, etc., and whenever anything developed that looked worth while talking about, it was brought in and talked over. General Hart and Mr. Wernse both were looking after the interests of the company, outside, and in the way of developing business propositions for it. I did not take an active hand in that part of the business; I had real estate.

Q. When they had looked it over and thought it

(Testimony of W. J. Morgan.)

was good, and so stated, you felt so, too, didn't you?

A. No, I didn't think so; unless it appealed to me. I never allow anybody else to do my thinking in business questions. [220—143] I cannot say positively that I can cite any particular instance where I voted against anything that was brought up, but my belief is I did on a number of occasions. It has been so long ago, about ten years ago, since this transaction happened, that my memory does not serve me.

The COURT.—Do you still retain your interest?

A. I do.

**[Testimony of H. C. Cutting, for Defendants  
(Recalled).]**

H. C. CUTTING, being recalled, testified as follows:

Mr. HART.—Q. Mr. Cutting, what conversation was had between yourself and the directors of the Monetary Trust Company in reference to the raising of money for the purpose of carrying on the business of the Point Richmond Canal & Land Company before the option to purchase this stock was given to you?

Mr. WHITMORE.—I think the question is too indefinite; it does not state what directors, or whether it was all of them or not, or at any time or place.

The COURT.—Yes, I think so. The objection will be sustained.

Mr. HART.—Exception.

The WITNESS.—I had a conversation with Mr. Mayo. Mr. Mayo was present at the meeting on September 3d, before the option to purchase this

(Testimony of H. C. Cutting.)

stock was given me, when the whole matter was discussed. I told Mr. Mayo at that meeting and the other directors, that I had an option on Mr. Reichart's stock at \$1 a share; that I expected to get Dr. Lewis' stock unless he would come in and join me, and that that would give me three-quarters of the stock of the company, and that as I had \$10,000 invested in the company, I wanted them to either take my stock and bonds— [221—144]

Mr. HART.—Q. Who was present at that meeting? Was Mr. Mayo present?

A. Mr. Mayo was present. He said he would not put up any money to go on with the Richmond proposition,—to carry on the work over at Richmond. I don't think that this matter is straight. I would like to make a statement of this whole proposition. I can make it in a few minutes and be cross-examined on it, and then I think everyone would understand it.

I met Mr. Mayo after December 20, 1906, after I gave that check for the stock, and we talked over my buying the stock.

Q. How soon after that did you talk over the fact of buying the stock with him?

A. Well, that is a hard thing to remember—1906—I could not remember the date, but I know Mayo often asked me how I was getting along over there, and everything; he knew that I had purchased the stock, and asked me how I was getting along.

He was up at 925 Golden Gate Avenue quite often. I think he called the next day after this meeting of the board, but I would not swear it was the next day.

(Testimony of H. C. Cutting.)

I knew he was there within a few days of the time that it was done, and the whole matter was talked over, and I explained to him that I had my own money in there and that I had a majority of the stock of the Point Richmond Canal & Land Company, and I was going to go ahead with the work, and I would put an assessment on the stock of the Point Richmond Canal & Land Company, and if the Monetary did not pay its assessment, it would get nothing for its stock, but that the Monetary had put up about \$500—and that was your advice, General, that I buy the Monetary at \$1.00 a share the same as I had bought everybody else's. It was done on your advice, that I gave them \$1 a share. I could have just as well [222—145—146] assessed the stock of the Point Richmond Canal & Land Company and then if they did not come through and pay their assessment and put up one-quarter of what I had to put up, they would have got nothing for it.

I am just talking of Mr. Mayo.

I had that conversation, in substance, with Mr. Mayo on the 3d of September, when all the directors were there, and then it was talked over again afterwards; it was talked over a whole lot of times, in 1906. At that time I was president of the Monetary Trust Company.

At that time, before his check was paid in, the Monetary Trust Company had no money of its own to pay any assessment on this stock; it never did have any money except what Mayo and I paid in.

Q. When did you first learn that the complainants



(Testimony of H. C. Cutting.)

in this case had any interest in this company?

A. When Mr. Mayo gave his testimony here.

Mr. WHITMORE.—I object to that as immaterial and irrelevant, what he heard about it.

The COURT.—Yes, that is wholly immaterial, when he first heard about it.

The WITNESS.—“I did not know at any time that these complainants had any interest other than the five shares until it was testified to by Mr. Mayo and up to the time of the filing of this bill.”

Mr. HART.—Q. Mr. Cutting, have you any further statement you desire to make in reference to the transaction of the sale of this stock? If so, state it.

A. I don't know of anything that I can think of. I would like to state, in answer to the charges, that I did not compel any of the directors to vote Aye or No on the proposition; it was left up to them—it was put up to them as a square [223—147—148] business proposition.

I absolutely did not undertake to control the directors in their decision. Mr. Wernse was not in my employ until the spring of 1907; he was the employee of the Monetary Trust Company; I had nothing to do with the organization of the Monetary Trust Company. They came after me and got me to go there. I charged them nothing for my services; I put up money to pay their expenses. I tried to sell these bonds. I tried to do this thing for them, but nobody else would do anything. We tried to get—

The General and I have had no chance to talk this matter over. I came down from Seattle here

(Testimony of H. C. Cutting.)

day before yesterday, and we had no chance to prepare our case.

Mr. HART.—Q. During the time that the offices of the Trust Company were at 79 New Montgomery Street, was Mr. Wernse at any of that time under your employ?

A. At no time until the spring of 1907. I had no business down here that justified my employing anybody.

The COURT.—Q. After the spring of 1907, his services have never been charged to the company?

A. No.

Q. It was only prior to that time?

A. Prior to that time, and no expense has been charged to the Monetary Trust Company. And the reason why I borrowed this money from the Monetary Trust Company was so as to avoid the expense of hiring someone to look after it. I owe the money to the Monetary Trust Company, and I am willing to pay it any time it is called for, but I might as well use it and pay 8 per cent. [224—149—150]

(An adjournment was here taken until Tuesday, November 24, 1914, at ten A. M.)

Tuesday, November 24, 1914.

The witness H. C. CUTTING, being recalled, testified as follows:

Mr. HART.—Q. Do you know whether any salaries were paid after the fire by the Monetary Trust Company to anyone?

A. I think Mr. Wernse drew a salary for two or three months after the fire.

(Testimony of H. C. Cutting.)

I began active work with the Point Richmond Canal & Land Company in the spring of 1907, about April, I think.

The certificates of the shares of stock of the Monetary Trust Company in the Point Richmond Canal & Land Company was delivered to me at the time I gave my check for it— the 20th of December, 1906.  
[225—150]

Negotiations had been carried on in reference to the purchase of that stock previous to that time. I had asked different members of the Monetary what they were going to do along in August and September.

The members of the executive committee at the time of the option were [226—151] the chief counsel, yourself, Wm. H. H. Hart, the president, myself, and Mr. Wernse. That option was in writing. As president I was a member of that committee at that time. The option was signed by Wernse and yourself.

I remember the suit of Hackett v. Point Richmond Canal & Land Company; that was in 1904 or 1905.

The purpose of that was, the Hackett dredge went over there and attempted to do some dredging and they failed in doing what they attempted to do, and they afterwards sued the Point Richmond Canal & Land Company for something like \$400—something over \$400. The suit was for a larger sum, but they obtained a judgment for something over \$400. I guess that was it. I don't think they ever obtained a judgment but it was settled for that.

The Monetary Trust Company had no money to do

(Testimony of H. C. Cutting.)

anything with, and the stockholders of the Monetary Trust Company were not willing to put up any to pay off that claim. They were not willing to be assessed.

On cross-examination the witness testified as follows:

I had advanced to the Point Richmond Canal & Land Company \$10,125 prior to the 20th of December, 1906. For that \$10,125, I received 27 of the bonds of the Point Richmond Canal & Land Company and 2350 shares of stock from Mr. Reichart.

\* \* \*

The COURT.—What was the consideration paid for it?

A. The consideration was that if I should buy the 27 bonds for \$10,125, that the stock should be given to me, the way I understand it.

Q. By Mr. Reichart.

A. Yes; Mr. Reichart owned all the stock except—the agreement really was at the time that I would do this, then the Monetary should get the 1175 shares; [227—152] otherwise, the Monetary would not have gotten anything.

Mr. WHITMORE.—Q. Then you did not pay any-money consideration for the stock of the Point Richmond Canal & Land Company?

A. I certainly would never have bought the bonds if I had not got the stock; nobody would.

Q. You paid no money for it, more than to buy these bonds?

A. You can take that as you please; I paid the



(Testimony of H. C. Cutting.)

\$10,125 for the stock or the bonds, but I certainly would not have bought the bonds unless I got the stock.

Mr. WHITMORE.—I ask that that last statement be stricken out.

The COURT.—Let it go out.

Mr. WHITMORE.—You bought these bonds at 75 cents on the dollar?     A. Yes.

I did not advance any money to that corporation other than the money I paid for the purchase of those bonds at 75 cents on the dollar, up to that time. I could not say how many of the bonds have been retired as a lien against that property. I don't remember offhand. I should think about 40 or forty-five thousand dollars' worth; that would be probably 80 or 90 bonds. I should think about in the neighborhood of one-third of this land owned by the Point Richmond Canal & Land Company has been contracted for sale.

I could not answer as to how much money has been received from the sale of that land; approximately, I should think perhaps \$75,000 or \$80,000.

Q. Hasn't there been \$750,000?

A. I don't know who received it; if there has been that much sold. There has not been that much contracted for, sold under contract, that they are paying on now. I think the contracts amount to about \$500,000. [228—153]

I purchased the balance of the bonds of the Point Richmond Canal & Land Company on an agreement with Mr. Mintzer, the holder of the other bonds.

(Testimony of H. C. Cutting.)

About \$30,000 worth of the bonds held by Mr. Mintzer have been released and surrendered.

Q. That reduced the purchase price of the property to that extent, did it?

A. They have been paid; the bonds have been paid.

Q. Yes, but didn't you have a contract with Mr. Mintzer whereby they took a less price and released some of these bonds?

A. No, I didn't release any of the bonds.

After the fire of April, 1906, I think the Monetary Trust Company closed up that Pacific Underwriting & Trust proposition; that is all the business they did that I know of; we could not do business without money.

I borrowed some money from that company; I have not paid that, but I will any time.

Q. You own 753 shares of stock of this company, and you have only paid \$1,826.25?

A. I paid \$4,500 in cash for it, and the books show it. The books that are in this court show it.

Q. Will you get that book and show it.

A. Yes.

Q. Let us see it, please. \* \* \* Just turn to the books. You say the books show it.

A. I did not keep the books. The man that kept the books made a statement off of these books in that office the other day and the statement is here.

Mr. WHITMORE.—I ask that that be stricken out.

The COURT.—Let it go out.

(Testimony of H. C. Cutting.)

A. I can get the books and look through them.  
[229—154]

The WITNESS.—After I obtained these 1175 shares of stock it was about six months or about four months before I commenced to operate actively with the Point Richmond Canal & Land Co.

Q. And when acting actively, you had a sale of the property of the company, didn't you?

A. No, not until a long time afterwards; I put in over \$50,000 before there were any sales made; and then they did not amount to anything.

I did not have a sale in March or April, 1907.

I had all the stock before I put up the \$50,000. If I had not had it, I would not have put it up. I got all the bonds that were left. I had purchased 27 of the 64 bonds before that.

Q. When you say you put in \$50,000, you got bonds for all the money you put in, didn't you?

A. No; after the bonds were exhausted, I still put up quite a bit of money. [230—155]

Mr. HART.—If your Honor please, I dislike to testify in a case in which I am an attorney, but my client insists that I should make a statement in reference to that particular option matter, and I of course hate to do it, because I understand under the rules of the court that counsel is not permitted to sum up the case. Of course, in summing up the case, I will not refer to my own testimony, because that would be in the bosom of the Court. I desire to submit that matter to your Honor's consideration before I make my statement.

(Testimony of H. C. Cutting.)

The COURT.—Counsel is well aware of the rule; you can take your course accordingly.

Mr. HART.—Counsel on the other side will not object, because it simply goes as to a matter of record.

The COURT.—They have no right to object.

Mr. HART.—I presume not.

The COURT.—It rests with you. If you wish to take the stand, it is your privilege.

Mr. HART.—But if that would debar me from making a summing up of the case, I prefer not to do it.

The COURT.—Very well; you will have to advise yourself, General. The rule is very strict that if counsel testifies upon the merits, then he is precluded from summing up the case.

**[Testimony of H. W. Wernse, for Defendant  
(Recalled).]**

H. W. WERNSE, being recalled for the defendant, testified as follows:

Mr. HART.—I understand, your Honor, that all the minutes and the by-laws are in evidence.

The COURT.—I think so.

Mr. HART.—Q. Mr. WERNSE, have you in your possession a certified copy of the articles of incorporation of the Monetary Trust Company?

A. Yes, sir.

These are in evidence as Deft's. Ex. "D."

**[231—156]**

Testimony closed.



The following pages from 159 to 291 inclusive are photographic copies of records, papers and documents admitted in evidence in behalf of the respective parties to the suit.

Dated, San Francisco, California, December 4, 1915.

JACOB M. BLAKE,

Solicitor for the Defendant, Henry C. Cutting.

**[Stipulation as to Statement of Evidence.]**

It is hereby stipulated by and between the parties hereto that the within, and foregoing statement of the evidence has been engrossed as previously settled this 31st day of December, 1915.

**[Order Certifying and Allowing Statement of Evidence.]**

The above and foregoing statement being stipulated, as correct is hereby certified and allowed this 3d day of January, 1916.

WM. C. VAN FLEET,

District Judge.

JOHN B. CLAYBERG,

CLAYBERG & WHITMORE,

Solicitors for Complainant.

JACOB M. BLAKE,

Solicitor for Defendant, Henry C. Cutting.

W. H. H. HART,

Solicitor for Monetary Trust Co. **[232—157 ]**

[Here follows photographic copies of Exhibits, being pages 234 to 405, inclusive, of Original Certified Transcript of the Record.]

**Petition for Appeal.**

The above-named defendant, Henry C. Cutting, conceiving himself aggrieved by the decree entered in the above-entitled cause on the 6th day of October, 1915, hereby appeals from said decree, and from each and every severable part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and prays that the appeal may be allowed and that a transcript of the records, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner prays that said decree, and each and every severable part thereof, may be reviewed and reversed.

Dated November 5th, 1915.

JACOB M. BLAKE,

Solicitor and Counsel for the Defendant, Henry C. Cutting.

[Endorsed:] Filed November 5, 1915. [406]

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**Assignments of Error.**

The defendant above named, Henry C. Cutting, asserts, that in rendering the decree in the above-entitled cause on the 6th day of October, 1915, the said District Court erred in the following particulars, to wit:

## I.

In overruling the motion of the defendant, Henry C. Cutting, to dismiss complainant's third amended bill of complaint.

## II.

In finding that the complainants were, or either of them was, a shareholder in their or his own right in the defendant, the Monetary Trust Company, at the time of the contract of sale of 1,175 shares of the capital stock of the Point Richmond Canal & Land Company by the Trust Company to the said Cutting on or about the 20th day of December, 1906.

## III.

In finding that this suit was not a colusive one to confer on a court of the United States, jurisdiction of a case of which it would not otherwise have cognizance.

## IV.

In finding that the complainants, or either of them, had made any efforts in good faith, or at all, to secure the action [407] they desire on the part of the managing directors of the Monetary Trust Company, and had failed therein.

## V.

In finding that the complainants, or either of them, had made any efforts in good faith or at all, to secure the action they desire on the part of the other shareholders of the Monetary Trust Company, and had failed therein.

## VI.

In not finding that the complainants, nor either of them, had no good or sufficient reasons for not mak-

ing any efforts to secure the action they desire on the part of the managing directors of the Monetary Trust Company or of the other shareholders.

#### VII.

In finding that the complainant, Henry J. Woodward, was ever the equitable owner or holder, for a valuable consideration or otherwise, of six hundred shares, or thereabouts, or of any, of the capital stock of the defendant, the Monetary Trust Company.

#### VIII.

In finding that the complainants, Henry J. Woodward and Francis A. Woodward, or either of them, were ever the legal and beneficial owners of any substantial amount of the capital stock of the Monetary Trust Company, or of any amount thereof more than the amount necessary to qualify them as directors of said trust company, and that they ever were the beneficial owners of such last-mentioned amount of stock.

#### IX.

In finding that the defendant, Henry C. Cutting, promised and agreed with the defendant, the Monetary Trust Company, or any of its officers at the time of or before any stock of said trust company was issued to him, or at all, that he would pay [408] into the treasury of said trust company ten dollars (\$10.00) per share for five hundred (500) shares of said capital stock, and also that he would finance said company and place it in such a condition that it could safely proceed with its business in a proper method and manner.



## X.

In declaring the contract entered into on or about December 20, 1906, between the defendant, the Monetary Trust Company, and the defendant, Henry C. Cutting, for the transfer to the latter of said 1,175 shares of the capital stock of the Point Richmond Canal & Land Company, was and is fraudulent and void, and vested no title to said shares of stock in the said Cutting, but that said shares of stock still remain the property of the Monetary Trust Company, and that the latter is entitled to have said shares restored to its name upon the books of said Point Richmond Canal & Land Company.

## XI.

In declaring that the defendant, Henry C. Cutting, has no title or right of property in or to the income, profits, dividends, or benefits of any character received by, or derived to his benefit from or on account of said 1,175 shares of the capital stock of said Point Richmond Canal & Land Company since the transfer thereof as aforesaid, or while the same has stood in his name; and that the complainants, on behalf of the defendant, the Monetary Trust Company, are entitled to have an accounting from the defendant, Henry C. Cutting, of all such profits, dividends, or benefits, if any.

## XII.

In finding that the defendant, Henry C. Cutting, has conducted his private business affairs with and through the instrumentality of the employees and officers of the defendant, the [409] Monetary Trust Company, and has fraudulently and wrong-

fully caused his own private stenographer to be paid out of the assets and property of said trust company.

### XIII.

In finding that the defendant, Henry C. Cutting, has fraudulently caused the defendant, the Monetary Trust Company, to purchase a large amount of choice furniture, and make elaborate and expensive changes in the interior of the offices of said trust company for the sole, or any, use or benefit of the said Cutting.

### XIV.

In finding that the defendant, Henry C. Cutting, has unlawfully, fraudulently, or at all, misapplied or misappropriated any money, funds, securities, profits or properties of the defendant, the Monetary Trust Company.

### XV.

In finding that the defendant, the Monetary Trust Company, was ever the legal or equitable owner or holder of any other 1,175 shares, or of any share or number of shares of the capital stock of the Point Richmond Canal & Land Company, other than the 1,175 shares thereof first hereinbefore mentioned, or that said trust company was ever the legal or equitable owner or holder of any bonds, stocks, securities or other property, real, personal, or mixed, issued by or formerly the property of the Point Richmond Canal & Land Company, other than 1,175 shares of stock last aforesaid.

### XVI.

In finding that the defendant, Henry C. Cutting, ever proposed to the defendant, the Monetary Trust Company, that he would finance, and furnish all the

funds necessary to develop and sell the lands of the Point Richmond Canal & Land Company; or that he would buy Ten Thousand Dollars' (\$10,000) worth of the bonds [410] of the Point Richmond Canal & Land Company, and that when that amount was spent he would raise whatever further amount of money might be necessary; or that the Monetary Trust Company accepted such a proposition.

### XVII.

In finding that the defendant, Henry C. Cutting, has been guilty of any fraud, deceit or misrepresentations as the president, or a director, or a stockholder of the defendant, the Monetary Trust Company, or as an individual, in any transaction had by him, or in which he has participated, for and on behalf of said trust company, or with it in his personal capacity.

### XVIII.

In declaring that the plaintiffs, for and on behalf of said Monetary Trust Company, are entitled to an accounting from the defendant, Henry C. Cutting, of all moneys due and owing, if any be found, from said Cutting to said trust company for and on account of any other 1,175 shares of the capital stock of said Point Richmond Canal & Land Company, alleged to have been sold and delivered to the said Cutting by said trust company prior to said 20th day of December, 1906, and likewise to a full accounting of any and all bonds, evidences of indebtedness, and interest or income therefrom, and of all other property of every kind of the Monetary Trust Company, if any, which may be found to have been taken or have

come into the possession of said defendant, Henry C. Cutting, and of any and all sums of money or funds of said Monetary Trust Company paid, laid out or expended by or on behalf of said Cutting on account of office or room rents, or other expenses of any character, or of any sums of money whatsoever belonging to said Monetary Trust Company in anywise appropriated to the use or benefit of said defendant, Henry C. Cutting, and generally to an accounting of all financial or money transactions [411] of any and every character had and occurring between said trust company and the said Cutting during the period covered by the bill of complaint.

#### XIX.

In denying the petition for a rehearing of the defendant, Henry C. Cutting, for the reason that the same, and the affidavits in support thereof, did not state facts sufficient to justify the relief prayed for upon the ground of newly discovered evidence, material to the defense of the said Cutting, and which could not have been known and produced at the trial by the exercise of reasonable diligence.

#### XX.

In denying the petition of the defendant, Henry C. Cutting, for a rehearing for the reason that the same, and the affidavits in support thereof, did not state facts sufficient to justify the relief prayed for on the ground of accident and surprise occurring at the trial and prejudicial to the defense of the



said Cutting, against which ordinary prudence and caution could not have guarded.

JACOB M. BLAKE,  
Solicitor and Counsel for the Defendant, Henry C.  
Cutting.

[Endorsed]: Filed November 5, 1915. [412]

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### **Order Allowing Appeal.**

On this 5th day of November, 1915, came Henry C. Cutting, one of the defendants in the above-entitled cause, and filed herein and presented to this court his petition for the allowance of an appeal from the decree made and entered in said cause on the 6th day of October, 1915, and from each and every severable part thereof, together with his assignments of error, and praying that a transcript of the records, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

In consideration whereof this court does hereby allow the said appeal of the said Henry C. Cutting from said decree and each and every severable part thereof, upon the said Cutting giving a bond according to law and the rules of said Circuit Court of Appeals in the sum of five hundred (\$500) dollars, to answer all costs if he shall fail to sustain his said appeal.

Done this 5th day of November, 1915.

WM. C. VAN FLEET,  
District Judge.

[Endorsed]: Filed November 5, 1915. [413]

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS: That we, Henry C. Cutting, as principal, and Fidelity and Deposit Company of Maryland, a Corporation created, organized and existing under and by virtue of the laws of the State of Maryland, as surety, are held and firmly bound unto Henry J. Woodward, Francis A. Woodward, and the Monetary Trust Company, a corporation under the laws of California, in the full and just sum of Five Hundred (\$500) Dollars, to be paid the said Henry J. Woodward, Francis A. Woodward and the Monetary Trust Company, their certain attorneys, executors, administrators, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, by these presents.

Sealed with our seals and dated this 5th day of November, 1915.

WHEREAS, lately and on the 6th day of October, 1915, at a District Court of the United States for the Northern District of California, Second Division, in a suit depending in said court, between Henry J. Woodward and Francis A. Woodward, complainants, and Henry C. Cutting and the Monetary Trust Company, a corporation, defendants, a decree was rendered against the defendant, Henry C. Cutting, and in favor of the complainants on behalf of the defendant, The Monetary Trust Company; and the said defendant, Henry C. Cutting, having obtained from said court an order allowing an appeal

to the United States Circuit Court of Appeals for [414] the Ninth Circuit to review and reverse the said decree in the aforesaid suit, and a citation directed to said Henry J. Woodward, Francis A. Woodward, and The Monetary Trust Company, a corporation, citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said Henry C. Cutting shall prosecute his said appeal to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void else to remain in full force and virtue.

HENRY C. CUTTING.

By JACOB M. BLAKE,

His Solicitor and Counsel,

Principal.

FIDELITY AND DEPOSIT COMPANY  
OF MARYLAND. (Seal)

By EDWIN C. PORTER,

Attorney in Fact.

Attest: PAUL M. NIPPERT, Agent.

Examined and approved this 5th day of November, 1915.

WM. C. VAN FLEET,

District Judge. [415]

**(Praeceptum for Transcript on Appeal.)**

Please prepare transcript on appeal, incorporating the following papers:

1. Original bill of complaint.
2. Order of dismissal of original bill of complaint.
3. First amended complaint (setting out identical paragraphs in original bill by reference only).
4. Order of dismissal of first amended bill of complaint.
5. Second amended bill of complaint (setting out identical paragraphs in either original or first amended bill by reference only).
6. Orders on two motions to dismiss, filed May 27, 1913.
7. Orders in two motions to dismiss and strike from the files, filed October 1st, 1913.
8. Substitution of attorneys and any order thereon.
9. Stipulation and third amended bill of complaint (in full).
10. Motion to dismiss and strike 3d amended complaint.
11. Amendment 3d amended complaint.
12. Order overruling motion to dismiss 3d amended complaint.
13. Answer to 3d amended complaint.
14. All written opinions of trial judge on file in cause.
15. Petition for rehearing and affidavits in support thereof.



16. Substitution of solicitors for defendant Cutting and notice thereof and order thereon. [416]
17. Interlocutory decree.
18. Appeal papers; assignment of errors; petition; order; citation and bond.
19. Praeceptum for record of appeal, proof of service thereof.
20. Notice of lodgment with clerk, of statement of evidence and proof of service thereof.

N. B. In the preparation of the foregoing transcript, care should be taken to comply with Rule 76, rules of practice for Courts of Equity of the United States.

JACOB M. BLAKE,

Solicitor for Defendant, Henry C. Cutting.

Due service of the within praecipe for transcript on appeal, and receipt of a copy thereof is hereby acknowledged at San Francisco, California, this 4th day of December, 1915.

JNO. B. CLAYBERG,

CLAYBERG & WHITMORE,

Solicitors for Appellees Henry J. Woodward and Francis A. Woodward.

WM. H. H. HART,

Solicitor for Appellee Monetary Trust Company.

[417]

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### **Objections to Proposed Transcript.**

Now come the complainants by Clayberg & Whitmore, their solicitors, and object to the insertion in the transcript on appeal of the following papers specified in a certain praecipe for the transcript on appeal,

filed with the clerk of this court, by the solicitor for the appellant, Henry C. Cutting, viz.:

Paper No. 1, Original bill of complaint.

Paper No. 2, Order of dismissal of original bill of complaint.

Paper No. 3, First amended complaint (setting out identical paragraphs in original bill by reference only).

Paper No. 4, Order of dismissal of first amended bill of complaint.

Paper No. 5, Second amended bill of complaint (setting out identical paragraphs in either original or first amended bill by reference only).

Paper No. 6, Orders on two motions to dismiss, filed May 27, 1913.

Paper No. 7, Orders in two motions to dismiss and strike from the files, filed October 1st 1913.

Paper No. 15. Petition for rehearing and affidavits in support thereof.

This objection is made for the reason that none of said papers are necessary to complete said transcript on appeal, and no questions can be presented to said Appellate Court or be [418] based on said papers or any of them, and that their insertion in said transcript would needlessly encumber the same with useless and immaterial matter.

The above objections are made for the purpose of protecting complainants from the costs of printing unnecessary matter in the transcript on appeal, in case the Appellate Court reverses the decree appealed from.

CLAYBERG & WHITMORE,  
Solicitors for Complainants.

Due service and receipt of a copy of the within objections to proposed transcript is hereby admitted this 13th day of Dec., 1915.

JACOB M. BLAKE,  
Solicitor for Deft. Henry C. Cutting. [419]

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**Certificate of Clerk U. S. District Court to Transcript of Record.**

I, Walter B. Maling, clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing four hundred nineteen (419) pages, numbered from 1 to 419 inclusive, to be a full, true and correct copies of the record and proceedings as enumerated in the praecipe for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$230; that said amount was paid by Henry C. Cutting, defendant; and that the original citation issued herein is hereunto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 7th day of January, A. D., 1916.

[Seal]

WALTER B. MALING,  
Clerk.

By J. A. Schaertzer,  
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled  
Jan. 7/16., J. A. S.] [420]

**[Citation on Appeal (Original).]**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Henry J. Woodward, Francis A. Woodward, and The Monetary Trust Company, a Corporation  
Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, Second Division, wherein Henry C. Cutting is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable William C. Van Fleet, United States District Judge for the District Court of the United States for the Northern District of California, Second Division, this 5th day of November, A. D. 1915.

WM. C. VAN FLEET,  
United States District Judge. [421]



Due service of the within citation on appeal is admitted this 5th day of November, 1915.

JNO. B. CLAYBERG,

CLAYBERG & WHITMORE,

Solicitors for the Appellees, Henry J. Woodward and Francis A. Woodward.

WM. H. H. HART,

Solicitor for the Appellee, The Monetary Trust Company, a Corporation.

[Endorsed]: (Original) No. 2—Equity. United States District Court for the Northern District of California, Second Division. Henry C. Cutting, Appellant, vs. Henry J. Woodward, Francis A. Woodward and The Monetary Trust Company, a corporation, Appellees. Citation on Appeal. Filed Nov. 6, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

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[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Henry C. Cutting, Appellant, vs. Henry J. Woodward, Francis A. Woodward and The Monetary Trust Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Second Division.

Filed January 8, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.

**Order Enlarging Time [to December 20, 1915] for  
filing Record.**

It appearing that the statement of the evidence has not yet been settled and allowed, as required by Rule 76 (b) of the Rules of Practice of Courts of Equity of the United States, and good cause appearing therefor,

IT IS HEREBY ORDERED that the appellant, Henry C. Cutting, may have, and he is hereby granted to and including the 20th day of December, 1915, within which to file the record in the above-entitled action with the clerk of the above-entitled court, at San Francisco, California, and to docket said cause in said court.

Dated December 2d, 1915.

WM. W. MORROW,  
Judge.

[Endorsed]: Filed Dec. 2, 1915.

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**Order Enlarging Time [to January 6, 1916] for  
filing Record.**

It appearing that the statement of the evidence has not yet been settled and allowed, as required by Rule 75 (b) of the Rules of Practice of Courts of Equity of the United States, and good cause appearing therefor,

IT IS HEREBY ORDERED that the appellant, Henry C. Cutting, may have, and he is hereby granted to and including the sixth day of January, 1916,

within which to file the record in the above-entitled action with the clerk of the above-entitled court, at San Francisco, California, and to docket said cause in said court.

Dated December 17th, 1915.

WM. C. VAN FLEET,  
Judge.

[Endorsed]: Filed Dec. 17, 1915.

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**Order Extending Time to [January 8, 1916, to] file  
Record.**

Good cause appearing therefor, it is hereby ordered that the appellant may have to and including January 8, 1916, within which to file his record on appeal and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated January 6, 1916.

WM C. VAN FLEET,  
United States District Judge.

[Endorsed]: Filed January 6, 1916.

[Endorsed]: Three Orders Under Rule 16 Enlarging Time to January 8, 1916, to File Record Thereof and to Docket Case. Refiled January 8, 1916.

**Stipulation [as to Printing Transcript of Record,  
etc.].**

It is hereby stipulated that in the printing of the transcript and record on appeal in the above-entitled cause, the following need not be printed:

1. Title of court and cause throughout, except on the Third Amended Bill of Complaint and the Decree.

2. Verification and endorsements except date of the filing of the Third Amended Bill of Complaint, Answer, the Assignments of Error and the Petition and Order for Appeal.

3. Notice of Time of Settling Objections to the transcript on Appeal, at page 233, Statement of the Evidence.

4. The photographic copies of Exhibits, pp. 234 to 405, inclusive of the statement of the evidence.

It is stipulated that all of said documents have been filed and that it is not the intention of the parties to stipulate the aforesaid photographic copies of exhibits out of the record, but that the appellant may apply to the presiding Judge of the United States District Court for the Northern District of California, for such order or rule for the safe-keeping, transporting to the clerk of the above-entitled court, and the return of such original exhibits, now in the custody of the clerk of said District Court, as to him may seem proper. The appellant further stipulates that he will have printed a supplemental transcript showing said photographic copies of said exhibits, or any of them, as may be ordered by the appellees, or any of them, or by the Court.

Nothing herein contained shall be deemed a waiver on the part of the appellees Henry J. Woodward and Francis A. Woodward of their objections



to the inclusion of said exhibits as a part of the record on appeal.

Dated January 11th, 1916.

JACOB M. BLAKE,

Attorney for Appellant.

JNO. B. CLAYBERG,

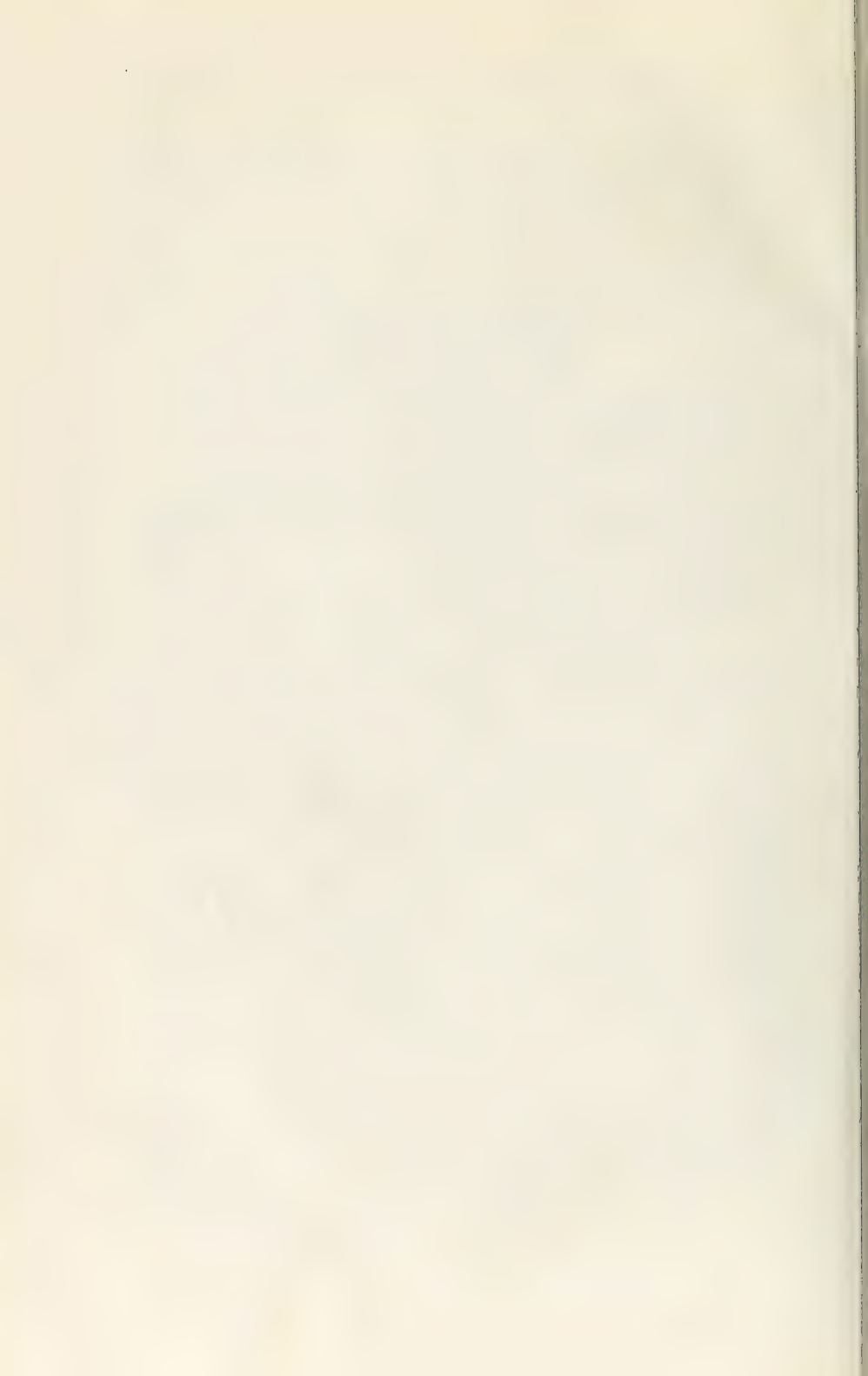
CLAYBERG & WHITMORE,

Attorneys for Appellees Henry J. Woodward and  
Francis A. Woodward.

WM. H. H. HART,

Attorney for the Appellee, the Monetary Trust  
Company.

[Endorsed]: Filed Jan. 14, 1916.



IN THE  
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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HENRY C. CUTTING

*Appellant*

*vs.*

HENRY J. WOODWARD, FRANCIS A. WOODWARD, and  
THE MONETARY TRUST COMPANY, a corporation

*Appellees*

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Appellant's Brief

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR  
THE NORTHERN DISTRICT OF CALIFORNIA, SECOND DIVISION

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JACOB M. BLAKE

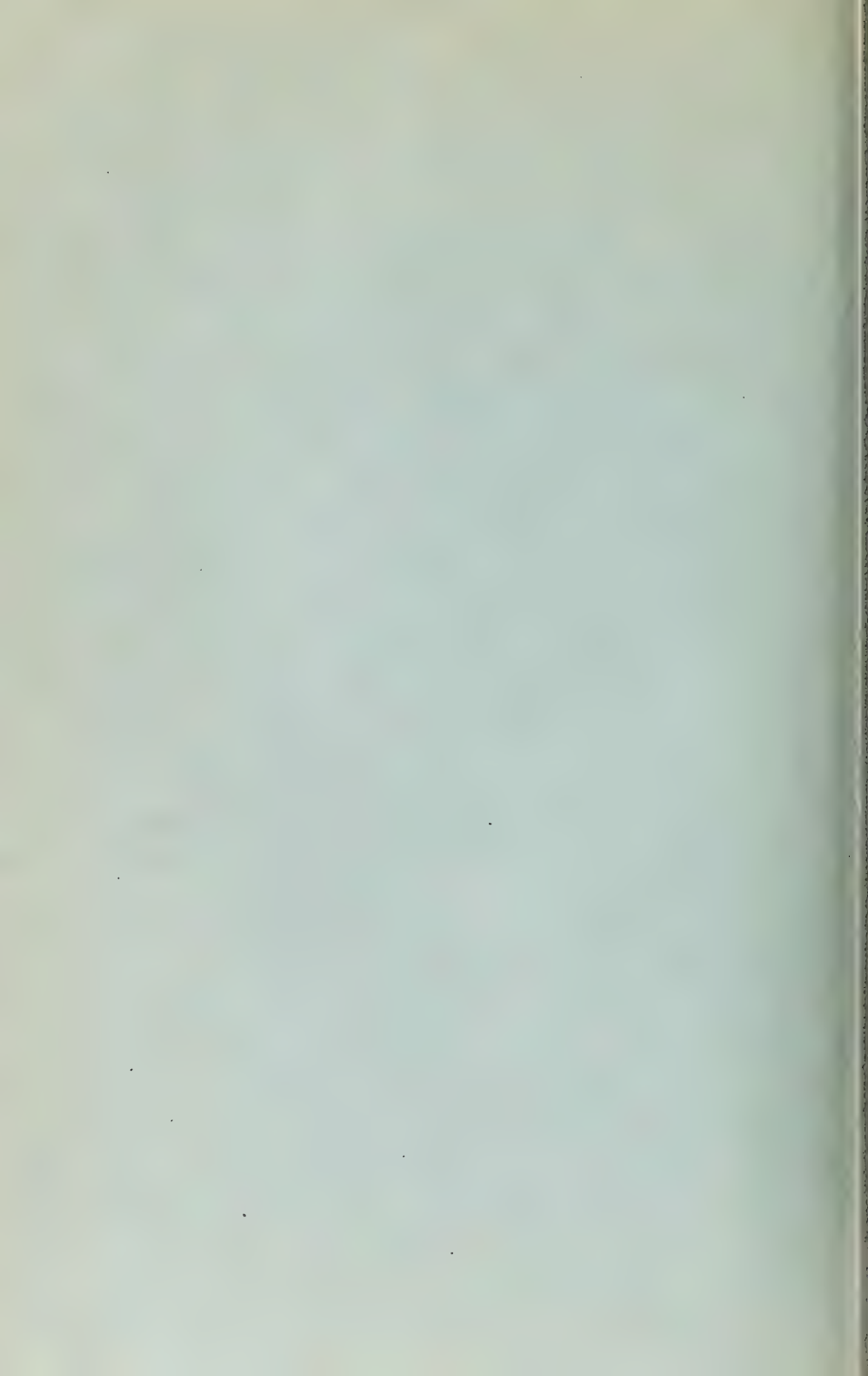
Solicitor for Appellant

FILED

MAR 17

F. D. M.

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No. 2399

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HENRY C. CUTTING,

Appellant,

vs.

HENRY J. WOODWARD, FRANCIS A. WOOD-  
WARD, and THE MONETARY TRUST COM-  
PANY, a corporation,

Appellees.

## APPELLANTS' BRIEF

### Appeal From the District Court of the United States for the Northern District of California, Second Division

#### Statement of the Case

This is a stockholder's suit brought by the plaintiffs, citizens of Illinois, against Henry C. Cutting and The Monetary Trust Company, a California corporation, for the purpose of having a transfer of 1175 shares of the capital stock of the Point Richmond Canal and Land

Company from the Trust Company to the appellant Cutting, its President, declared fraudulent and void, and for a general accounting between The Monetary Trust Company and Cutting. The plaintiff, Henry J. Woodward, alleges that he is the equitable owner of 600 shares of the stock of the Monetary Trust Company of the par value of \$100.00 per share, which the books of the company show stands in the name of one H. B. Mayo; and the plaintiff, Francis A. Woodward, alleges that he is the legal owner of 5 shares of the stock of the defendant company. The ownership of this stock is denied by the defendant. All of the allegations of the Complaint, which are made necessary by Rule 27, Rules of Equity governing the practice in such cases in the United States courts, are likewise denied. It is also alleged and denied that the directors and officers of The Monetary Trust Company, alleged to be under the control of the appellant Cutting, *are not bona fide owners and holders of any shares of capital stock in said Company other than the shares which Cutting has caused to be issued to them to qualify such officers in accordance with the By-Laws of the Company.*

The gravamen of the suit consists of the charge of constructive fraud arising out of the sale and transfer in December, 1906, by The Monetary Trust Company of the stock in controversy under allegations in the bill that the sale was not authorized by a valid resolution of the Board of Directors.

The Complaint also alleges that Cutting for many years prior to the filing of the suit by plaintiffs had been operating his private business and charging the cost and expenses thereof to The Monetary Trust Company, as

well as with having bought large amounts of office supplies and furniture for his private use and charging the same to the company, and otherwise charges him with misapplying, misappropriating and dissipating all of the assets of the company. It is also alleged that after the organization of The Monetary Trust Company it undertook to organize and promote the Point Richmond Canal and Land Company, and in so doing became the owner of an option or contract to purchase four hundred acres of land at or near Point Richmond, California, for \$336,000 out of \$400,000 worth of bonds to be issued by the Point Richmond Canal and Land Company, and secured by a mortgage upon such real property. It is alleged that the appellee, The Monetary Trust Company, obtained such option from Harry B. Mayo and Fred Reichert under an agreement that all of the capital stock of The Point Richmond Canal and Land Company, amounting to 5000 shares of the par value of \$100.00 per share should be issued one-fourth to Reichart, one-fourth to Mayo, and one-half to The Monetary Trust Company; also that \$64,000 worth of bonds of The Point Richmond Canal and Land Company <sup>were</sup> ~~were~~ to remain in its treasury to be used in developing the property. It is also alleged that subsequent to the agreement relating to the division and distribution of the stock of The Point Richmond Canal and Land Company, the Trust Company turned over and delivered to one A. N. Lewis, 150 shares of the stock of the land Company, leaving it the owner of 2350 shares of the stock of the former company; that immediately after this transaction, the appellant Cutting proposed to the Trust Company that he would finance the Point Richmond Canal and Land Company and furnish all the funds

necessary to develop and sell said land provided he could obtain the control of the Land Company; that he would buy \$10,000.00 worth of treasury bonds of the latter company, and when that money was spent, he would raise whatever further amount might be necessary; that the Trust Company accepted said proposal, delivered 2350 shares to Cutting, whereupon Cutting procured from other sources sufficient other stock to give him the control of the Land Company; and that he paid nothing for Land Company stock, has utterly failed to carry out his agreement to buy \$10,000 worth of said bonds and to finance the Land Company. The answer of the defendants admits the organization of the Land Company, the purchase of the real property by it, and the issuance of the bonds as alleged. It denies that the Trust Company ever transferred any shares of the Land Company's stock to Lewis, or that it ever became the owner of 2350 shares of that Company's stock, or that the appellant Cutting ever agreed to finance the Land Company upon obtaining control of its stock, or that the Trust Company ever delivered to Cutting the one-half (1175 shares) of its stock in the Land Company in the manner alleged. It denies that the Trust Company ever obtained an option or contract from H. B. Mayo to buy the real property at Point Richmond as alleged, but admits that Cutting came into a control of a majority of the stock of the Land Company through purchases from other sources. The appellant further denies that he paid nothing for the stock, or failed to carry out his agreement to purchase \$10,000.00 worth of bonds of the Land Company, or that he failed to finance the Land Company after he obtained control of it. There are special denials in the answer of



all the charges of fraud and deceit charged in the bill.

The decree of the Court found that the contract purporting to have been entered into on or about December 20, 1906, between the Board of Directors of the Trust Company and Cutting for the transfer to the latter of 1175 shares of stock of the Land Company was fraudulent and void, and vested no title in the latter, but that said "*stock still remains the property*" of the Trust Company, "and that the latter is entitled to have said shares restored to its name upon the books of said Point Richmond Canal and Land Company;" and that Cutting should account for the profits, if any, derived from said stock.

It was further adjudged that the defendant Cutting should account to the Trust Company "for all moneys due and owing, if any found," "for and on account of that certain other 1175 shares of the capital stock of said Point Richmond Canal and Land Company sold and transferred by said Monetary Trust Company to said defendant previously to said 20th day of December, 1906, and likewise he should account for "any and all bonds evidences of indebtedness, and interest, or income therefrom and of all other property of every kind of said Monetary Trust Company, if any which may be found to have been taken" by him as well as for any sums misappropriated, or misapplied by the said Cutting as an officer of the Trust Company.

The Monetary Trust Company was organized March 14, 1904, by H. G. Mayo, Dan Van Wagenen, Albert Betz, H. W. Wernse and W. J. Morgan, who were the directors for the first year. The capital stock of the company was \$1,000,000.00 divided into 10,000 shares of the par value of \$100.00 per share, and its powers were to accumulate

the funds of its stockholders and those of sinking and trust funds placed in its care, and generally to do a trust company business, excluding the taking of general deposits. The basis of its first stock issue is outlined in a letter from General Hart where in consideration of 2000 shares (\$200,000.00 worth) of paid up stock he agreed to assign; (a) a certain option contract authorizing him to make a loan of 8,000,000.00 yen, Japanese money to the Japanese Government, together with all commissions and emouments to arise therefrom: (b) to sell and assign all commissions to arise from a certain contract with George W. Brown, M. E., the California Gold Recovery Company, a corporation, and the owner of the Canon Placer Mining claims on the Hassayawpa River, and tributaries, in the County of Yrapai, Territory of Arizona: and (c) to turn or cause to be turned over certain business of the Investors Protective Bond & Trust Company, (Trans. pp. 130, 131, 132). The organization of the Trust Company took place in this manner before the appellant Cutting acquired any interest therein.

The Point Richmond Canal & Land Company was organized in the 14th day of July, 1904, by Frederick Reichart, A. N. Lewis, H. B. Mayo, H. W. Wernse and H. C. Cutting who became the directors for the first year. (Trans. p. 184.) The Company was formed upon the basis of a contract to buy the real property at Point Richmond which had been obtained by *Reichart* from the Mintzer and Tuzberry estates, (Trans. pp. 184, 194), and it was not until September 12, 1904, that the Land Company was fully organized by the issuance of all the stock, except that qualifying directors, to Reichart and the opening up of its general books. (See Stock certificate book

Stubs, S. of E. p. 271; Journal of Land Co., S. of E. p. 284).\* By an informal oral agreement between the Land Company and the Trust Company, which was afterwards abrogated (See minutes of Trust Co., S. of E. page 191) also Mayo's testimony (Trans. p. 167) and was never made a matter of record by the Trust Company, the latter agreed to pay the organization expenses, of the Land Company and promote the sale of its bonds in consideration of a stock interest in the Land Company. It was thought by both companies that between eight and ten thousand dollars would be sufficient for improvements on the land, in order to effect sales of the treasury bonds and the subdivisions at Point Richmond, (Trans. p. 187). In March, 1905, the Trust Company had made no headway with its work of financing the Land Company and at meeting of the Board of Directors of the Trust Company held March 27, 1905, the Trust Company agreed to receive 1175 shares of Land Company stock from Mr. Reichart in discharge its claims against the Land Company under the previous oral agreement, (Trans. pp. 165, 167). The whole amount which had been laid out by the Trust Company in organization expenses of the Land Company did not exceed \$1,000 (Trans. p. 157). On the 3d day of May, 1905, the appellant Cutting entered into an agree-

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\* There has been omitted from the transcript photographic copies of books, papers, and other exhibits, which are stipulated to be a part of the record in this case and which are here referred to by the page number of the statement of the evidence as filed in the lower Court. Besides the original documents which we will bring up under rule 14, we desire to have for the use of the Court, the photographic copies in the original statement of the evidence lodged in the lower Court, and the same matter contained in the Clerk's Transcript of the record in file in this Court. We will refer to these documents throughout both by description and by page number of the original statements of the evidence.

ment with Reichart who was then the owner of the three-fourths of 5000 shares of stock of the Land Company, less the Lewis stock and ten qualifying shares to each of the directors, to give the former 2350 shares in consideration of his purchase of 27 Treasury bonds of the Land Company for \$10,125, or at the rate of \$375.00 per bond of \$500.00 face value, (Trans. pp. 189, 190).

With the expenditure of this money by the Land Company it was found that more money would be necessary before the property at Point Richmond could be put on the market, and the appellant Cutting refused to buy any more bonds from the Land Company, except upon the condition that other stockholders would take their *pro rata* share of them. At this time in the fall of 1906, the property was inaccessible swamp land near the unincorporated town of Richmond in Contra Costa County, a ship canal would have to be dug to the property and the land filled above high water mark before it would become salable. The improvements would cost in the neighborhood of \$150,000.00 and the whole property lay under a mortgage of \$400,000.00, \$336,000 of the bonds being outstanding against the Land Company to mature January 1st, 1915, (Trans. pp. 197, 198). It was stated by a disinterested witness, Mr. Wall, that in his opinion the land had no value above the mortgage in the fall of 1906 (Trans. p. 200). The appellant used his utmost effects in the fall of 1906 to finance the further development of the Land Company's property and asked the Trust Company to stand an assessment on the 1175 shares of Land Company stock owned by it together with his, to buy its *pro rata* shares of the Treasury bonds. He applied likewise to Dr. Lewis to come in on the financing of the Land



Company and when his effects in this behalf failed, he took an option on the one-quarter interest in the stock of that Company still held by Reichart and on 250 shares of stock held by Dr. Lewis, at a price of \$1.00 per share. (Trans. pp. 190, 194) (Plff's Ex. B., S. of E. p. 160) (Plff's Ex. C., S. of E. p. 161). It was probably between the date of taking the option from Reichart on August 29th, 1906, and the date of the Lewis option on November 5th, 1906, that the Executive Committee of the Trust Company, acting through its Chief Counsel, Gen. Hart, and the Trust officer Mr. Wernse, (Mr. Cutting being the other member), gave Mr. Cutting the option to purchase the 1175 shares of the Land Company stock owned by the Trust Company at the same price per share, (Trans. pp. 215, 216, 235). The first mention of this transaction in the books of the Trust Company is in the minutes of a stockholders' meeting on November 10, 1904. The record of this meeting is imperfect in regard to notice. At a prior meeting of the Board of Directors, held September 3, 1906, a resolution was passed reciting the fact that the annual meeting of stockholders had not been held, and directing it to be held in September 29, 1906. The minutes of the meeting of November 10th, 1906, merely recite that it was held "pursuant to adjournment." At this meeting, however, it appears from the minutes that Mr. Wernse offered for ratification the following option given H. C. Cutting, and upon motion of Mr. Wernse seconded by Mr. Betz, approved by the following votes, Mr. Wernse, representing 505 shares, W. J. Morgan representing 65 shares, Albert Betz representing 55 shares, H. C. Cutting, H. W. Wernse proxy, representing 753 shares being more than a majority of the shares issued."

At the same meeting "All actions of the Board of Directors and its officers since the last stockholders' meeting, were unanimously ratified, approved and confirmed." (Minutes of Trust Co., S. of E. pp. 193, 194.)

At a meeting of the Board of Directors of the Trust Company held on December 20, 1906, the minutes show that "Mr. H. W. Wernse, presented the check of H. C. Cutting for \$1175, stating that Mr. Cutting desired to exercise his right under the option given him by the Monetary Trust Company, ratified and confirmed by the stockholders at their last meeting, to purchase 1175 shares of Point Richmond Canal and Land Co., stock held by the Monetary Trust Company at \$1.00 per share. On motion of Mr. W. J. Morgan (under the advice of the Chief Counsel) and carried unanimously the cashier was ordered to deliver to H. C. Cutting the certificate for 1175 shares of Point Richmond Canal and Land Co., stock for \$1175 as per the option." There were present at this meeting but three out of the five members of the Board of Directors, including the appellant Cutting, the President of the Company; Mayo and Betz being absent. (Minutes of Trust Co., S. of E. p. 194.) The appellees contend that the sale of this stock was void for constructive fraud growing out of the fact that Cutting was disqualified to vote upon a resolution authorizing the sale thereof to himself, and that his presence being necessary to constitute a quorum, there was no legally constituted board present for that purpose at the meeting of December 20, 1906. The check referred to was never cashed, but the evidence shows that it was held for some time as a cash item and subsequently on June 1st, 1907, was turned into a loan for which Cutting gave his note. The

transaction was first entered in the books of the Trust Company on February 28th, 1907, simultaneously with the transfer of all the outstanding stock of the Land Company, of which Cutting now considered himself the owner. (Cash book of Trust Co., S. of E. p. 229; Stock Certificate book of Land Co., of E., p. 279). The presumption may be fairly indulged that the Trust Company did not deliver the 1175 shares in question to Cutting until that day. The delay in making these entries is explained by the fact that for over a year following the fire, the books of the company were in a safety deposit vault and were only visited periodically.

At the time of the sale and to and including the date of filing this suit Mr. Cutting was the owner of 753 shares of stock of the Trust Company; W. J. Morgan owned 65 shares. Albert Betz 55 shares, H. W. Wernse 505 shares (Minutes of Trust Co., S. of E. p. 194). Mayo 100 shares, Francis A. Woodward 5 shares; Mayo also had in his name 400 shares, here claimed by Henry J. Woodward as the equitable owner; and General Hart had in his name, or subject to be issued to him, 300 shares which was held by the Trust Company and in its possession as collateral to his note for \$1,000.00 (See Bill & Answer, Trans. pp. 14, 49); Cutting's interest, therefore, was but a little more than one-third of 2183 shares of issued stock. This total may not be exact as the Trust Company did not keep a Stock Ledger or Journal, but it is approximately correct as is admitted by the pleadings and shown by the evidence of all the parties. Of the 753 shares held by Cutting 305 shares were issued him out of Trustee stock which had been issued to Wernse under an arrangement by which the original promotion stock had been can,

celled and certain stock had been issued to him in consideration of the transfer of stock in the El Dorado Basin Gold Dredging Company as shown by the minutes of the meetings of the Trust Company of December 17, 1904, and January 7th, 1905 (S. of E., pp. 189-190). It will be noted that the motion made at the meeting of December 17th, 1904, was by Mr. Cutting that the stock issue of the Trust Company be placed on a dollar for dollar basis. The Ledger of the Trust Company has been lost, but a reference to the original entries made in the Cash Book and Journal of the Trust Company will show that Mr. Cutting has paid in cash for the balance of the stock standing in his name (448 shares) the sum of \$4528.75, or an amount entitling him to the issue of five additional shares of the Trust Company stock. We will hereinafter set forth a summary of the entries contained in the Cash Book and Journal of the Trust Company which will show the dates and amounts of these payments; the last payment having been made on September 1st, 1906, or three months previously to the alleged fraudulent purchase of the 1175 shares of Land Company Stock. It is admitted that the only cash subscriptions to the stock of the Trust Company were Mayo's and Cutting's, that they were both in an amount of \$5,000 each, and were to be paid for only as the Trust Company needed the money for use in its business. A reference to the Cash Book and Journal of the Trust Company will show that Mayo's subscription was paid in the same manner in which Cutting paid his, as will be hereafter more fully shown.

The record is clear throughout that the purchase and the manner of the payment for the 1175 shares of Land



Company stock by Cutting was openly discussed both before and after December 20, 1906. Mayo, by his own admission, knew of it the day following the meeting. The record shows it was expressly approved by Wernse, Betz, Morgan and Hart. The new relationship affected by the transfer of all the issued capital stock of the Land Company to Cutting, including the Reichart and Lewis stock, was known to all the parties and has been acquiesced in since December, 1906, to the date this suit was brought, (February 19, 1913). In fact, assuming that notice to Mayo is notice to the appellees, the Woodwards, the record will show there was not a single stock interest, either legal or equitable, connected with the Trust Company which has not had notice sufficient to work an estoppel against the Trust Company (Trans. pp. 146, 172, 173, 174, 222, 226, 232).

There is no evidence of control or domination of these independent stock interests by Cutting. The evidence is all the other way (Trans. pp. 222, 223, 224, 227, 228, 230, 233.)

The testimony does not sustain the contention that the Trust Company was not doing business on its own account prior to December 20, 1906. Its business was languishing but it put through the Pacific Underwriting transaction after the fire in 1906; (Trans, p. 238) and with the acquiescence of the stockholders it has drifted into a thoroughly moribund condition with its assets in the admitted condition shown by the pleadings.

It will not be contended that the record contains a scintilla of evidence that any demand has ever been made upon the Board of Directors by the appellees, the Woodwards, either directly or through Mayo, or upon any of

the stockholders of the Trust Company, that an action be brought to set aside the sale of the 1175 shares of the Land Company stock in question, or for an accounting on behalf of the Trust Company against the appellee Cutting, as required by Equity Rule 27. Mr. Cutting admits his obligation to repay the money evidenced by his note to the Trust Company, with interest, (Trans. p. 234), but denies that the company, in the absence of a showing of actual fraud is entitled to an accounting for moneys paid out by way of its legitimate expenses while a going concern.

Finally with the knowledge of all parties concerned in the Trust Company, Mr. Cutting from December 20, 1906, to the date of bringing this suit has continued in the sole and exclusive management of the Land Company, in reliance upon the *bona fides* of the transaction of that date. He expended over \$50,000 in the improvement of the real property of the Company at Point Richmond before anything was realized from the sale of lots. During all of this time the appellees have stood by and confirmed the apparent validity of the transaction by which both the stockholders and the directors of the Trust Company attempted to ratify the action of the executive committee in giving Mr. Cutting the option to buy the stock in controversy, by their failure to disaffirm the same within a reasonable time. In addition they have stood by and allowed the appellant to so change his position with respect to his interests in the Land Company that it will be impossible to return to the *statu quo* of the respective parties as of that date without indescribable hardship and loss to him and to the great detriment of innocent third parties. We confidently believe that, in the absence of a

clear proof of actual fraud, such a result is not contemplated either in law or equity and that the judgment of the lower court should be reversed, and the bill dismissed for want of equity.

### **Specifications of Error**

The defendant above named, Henry C. Cutting, asserts, that in rendering the decree in the above entitled cause on the 6th day of October, 1915, the said District Court erred in the following particulars, to-wit:

In overruling the motion of the defendant, Henry C. Cutting, to dismiss complainants' Third Amended Bill of Complaint.

#### **II**

In finding that the complainants were, or either of them, was, a share-holder in their or his own right in the defendant, The Monetary Trust Company, at the time of the contract of sale of 1,175 shares of the capital stock of the Point Richmond Canal & Land Company by the Trust Company to the said Cutting on or about the 20th day of December, 1906.

#### **III**

In finding that this suit was not a collusive one to confer on a Court of the United States, jurisdiction of a case of which it would not otherwise have cognizance.

#### **IV**

In finding that the complainants, or either of them,

had made any efforts in good faith, or at all, to secure the action they desire on the part of the managing directors of the Monetary Trust Company, and had failed therein.

## V

In finding that the complainants, or either of them, had made any efforts in good faith or at all, to secure the action they desire on the part of the other shareholders of the Monetary Trust Company, and had failed therein.

## VI

In not finding that the complainants, nor neither of them, had no good or sufficient reasons for not making any efforts to secure the action they desire on the part of the managing directors of The Monetary Trust Company or of the other shareholders.

## VII

In finding that the complainant, Henry J. Woodward, was ever the equitable owner or holder, for a valuable consideration or otherwise, of six hundred shares, or thereabouts, or of any, of the capital stock of the defendant, The Monetary Trust Company.

## VIII

In finding that the complainants, Henry J. Woodward and Francis A. Woodward, or either of them, were ever the legal and beneficial owners of any substantial amount of the capital stock of the Monetary Trust Company, or of any amount there of more than the amount necessary to qualify them as directors of said Trust Com-



pany, and that they were the beneficial owners of such last mentioned amount of stock.

## IX

In finding that the defendant, Henry C. Cutting, promised and agreed with the defendant, The Monetary Trust Company, or any of its officers, at the time of or before any stock of said Trust Company was issued to him, or at all, that he would pay into the treasury of said Trust Company ten dollars (\$10.00) per share for five hundred (500) shares of said capital stock, and also that he would finance said company and place it in such a condition that it could safely proceed with its business in a proper method and manner.

## X

In declaring the contract entered into on or about December 20, 1906, between the defendant, The Monetary Trust Company, the defendant, Henry C. Cutting, for the transfer to the latter of said 1,175, shares of the capital stock of the Point Richmond Canal & Land Company, was and is fraudulent and void, and vested no title to said shares of stock in the said Cutting, but that said shares of stock still remain the property of the Monetary Trust Company, and that the latter is entitled to have said shares restored to its name upon the books of said Point Richmond Canal & Land Company.

## XI

In declaring that the defendant, Henry C. Cutting, has no title or right of property in or to the income, profits, dividends, or benefits of any character received by, or

derived to his benefit from or on account of said 1,175 shares of the capital stock of said Point Richmond Canal & Land Company since the transfer thereof as aforesaid, or while the same has stood in his name; and that the complainants, on behalf of the defendant, The Monetary Trust Company, are entitled to have an accounting from the defendant, Henry C. Cutting, of all such profits, dividends, or benefits, if any.

## XII

In finding that the defendant, Henry C. Cutting, has conducted his private business affairs with and through the instrumentality of the employees and officers of the defendant, The Monetary Trust Company, and has fraudulently and wrongfully caused his own private stenographer to be paid out of the assets and property of said Trust Company.

## XIII

In finding that the defendant, Henry C. Cutting, has fraudulently caused the defendant, The Monetary Trust Company to purchase a large amount of choice furniture, and make elaborate and expensive changes in the interior of the offices of said Trust Company for the sole, or any, use or benefit of the said Cutting.

## XIV

In finding that the defendant, Henry C. Cutting, has unlawfully, fraudulently, or at all, misapplied or misappropriated any money, funds, securities, profits or properties of the defendant, The Monetary Trust Company.

## XV

In finding that the defendant, The Monetary Trust Company, was ever the legal or equitable owner or holder of any other 1,175 shares, or of any share or number of shares of the capital stock of the Point Richmond Canal & Land Company, other than the 1,175 shares thereof first hereinbefore mentioned, or that said Trust Company was ever the legal or equitable owner or holder of any bonds, stocks, securities or other property, real, personal, or mixed, issued by or formerly the property of the Point Richmond Canal & Land Company, other than 1,175 shares of stock last aforesaid.

## XVI

In finding that the defendant, Henry C. Cutting, ever proposed to the defendant, The Monetary Trust Company, that he would finance, and furnish all the funds necessary to develop and sell the lands of the Point Richmond Canal & Land Company; or that he would buy Ten Thousand Dollars (\$10,000.00) worth of the bonds of the Point Richmond Canal & Land Company, and that when that amount was spent he would raise whatever further amount of money might be necessary; or that the Monetary Trust Company accepted such a proposition.

## XVII

In finding that the defendant, Henry C. Cutting, has been guilty of any fraud, deceit or misrepresentations as the president, or a director, or a stockholders of the defendant, The Monetary Trust Company, or as an individual, in any transaction had by him, or in which he has

participated, for and on behalf of said Trust Company, or with it in his personal capacity.

### XVIII

In declaring that the plaintiffs, for and on behalf of said Monetary Trust Company, are entitled to an accounting from the defendant, Henry C. Cutting, of all moneys due and owing if any be found, from said Cutting to said Trust Company for and on account of any other 1175 shares of the capital stock of said Point Richmond Canal & Land Company, alleged to have been sold and delivered to the said Cutting by said Trust Company prior to said 20th day of December, 1906, and likewise to a full accounting of any and all bonds, evidence of indebtedness, and interest or income therefrom, and of all other property of every kind of The Monetary Trust Company, if any, which may be found to have been taken or have come into the possession of said defendant, Henry C. Cutting, and of any and all sums of money or funds of said Monetary Trust Company paid, laid out or expended by or on behalf of said Cutting on account of office or room rents, or other expenses of any character, or of any sums of money whatsoever belonging to said Monetary Trust Company in anywise appropriated to the use or benefit of said defendant, Henry C. Cutting, and generally to an accounting of all financial or money transactions of any and every character had and occurring between said Trust Company and the said Cutting during the period covered by the Bill of Complaint.

### XIX

In denying the petition for a re-hearing of the de-



fendant, Henry C. Cutting, for the reason that the same, and the affidavits in support thereof, did not state facts sufficient to justify the relief prayed for upon the ground of newly discovered evidence, material to the defense of the said Cutting, and which could not have been known and produced at the trial by the exercise of reasonable diligence.

## XX

In denying the petition of the defendant, Henry C. Cutting, for a re-hearing for the reason that the same, and the affidavits in support thereof, did not state facts sufficient to justify the relief prayed for on the ground of accident and surprise occurring at the trial and prejudicial to the defense of the said Cutting, against which ordinary prudence and caution could not have guarded.

## Points and Authorities

1. This suit should be dismissed for want of equity under Rule 27, Rules of Equity governing the practice in United States Courts.

(a) The record is barren of any proof that the plaintiffs below exerted any efforts to secure the action, which they here seek, on the part either of the managing directors, or of the shareholders of the appellee, The Monetary Trust Company.

Rule 27, Equity rules.

Hawes v. Oakland, 104 U. S., 450, 56, 57, 60.

Huntington v. Palmer, 104 U. S., 483.

Detroit v. Dean 106 U. S., 537-542.

Dimpfell v. Ohio & Miss. R. R. Co., 110 U. S., 209.

Quincy v. Steel, 120 U. S., 245, 247, 248.

Taylor v. Holmes, 127 U. S., 489, 492.

Venner v. Gt. Northern Ry. Co., 209 U. S., 34.  
 Wathen v. Jackson Oil, etc., Co., 235 U. S., 635.

(b) The plaintiffs cannot maintain this suit if the appellee, Trust Company, could not.

Burland v. Earle L. R. App. Cas. (1902), p. 83.  
*In re* Ambrose Tin etc. Co., L. R., 14 Ch. Div., 390.  
 Davenport v. Dows, 18 Wall., 626.  
 Hawes v. Oakland, *supra*.  
 Turner v. Markham, 155 Cal., 570.  
 Dickerman v. Northern Trust Co., 176 U. S., 181, 188.  
 Stewart v. St. Louis, etc. R. R. Co., 41 Fed., 736.  
 Coal Co. v. Trust Co., 127 Fed., 633  
 Larabee v. Dally 175 Fed., 378.  
 Lawrence v. Southern Pac. Co., 180 Fed., 825.

(c) Stockholders' suits of this nature cannot be maintained to set aside transactions alleged to be fraudulent only upon grounds of constructive fraud. The transaction sought to be annulled must be actually fraudulent or *ultra vires*.

Hawes v. Oakland, *supra*.  
 Burland v. Earle, *supra*.  
 Watkins v. Lawrence Nat'l Bk., 51 Kan., 254; 32 Pac., 914.  
 Metcalf v. Amer. School Furniture Co., 122 Fed., 115.

2. There is no fiduciary relation between a stockholder and the corporation, and he may legally vote his stock at a stockholders' meeting, to ratify a contract in which he is personally interested.

4 Thompson on Corporations, Secs. 4465, 4467.  
 Northwestern Transp. Co. v. Beatty L. R., 12; App. Cos., 589.  
 Gamble v. Queens Co. Water Co., 123 N. Y., 91; 25 N. E., 210.  
 Oil Co. v. Marbury, 91 U. S., 587, 589.  
 Gas Co. v. Berry, 113 U. S., 322.  
 Hanchet v. Blair, 100 Fed., 817.

3. The transaction involved in the sale of 1175 shares of Land Company stock by the Trust Company was only constructively fraudulent, if fraudulent at all, and was subject to ratification.

(a) The informalities attending the meeting of the stockholders of the company of November 10, 1906, and of the Board of Directors of December 20, 1906, might be properly waived by the corporation.

Thompson on Corporations, Sec. 1143.

Ashley Wire Co. v. Ill. Steel Co., 164 Ill., 149; 45 N. E., 410; 56 Am. St., 187.

Anderson Carriage Co. v. Pungs, 127 Mich., 543.

Nelson v. Hubbard, 96 Ala, 238.

(b) The record of a meeting in the book of a corporation is notice to its members.

Ashley Wire Co. v. Ill. Steel Co., *supra*; (56 Am. St. at p. 192).

(c) Minutes of proceedings of a meeting of the stockholders of a corporation raise a presumption that due notice thereof was given, and that its proceedings were lawful and regular.

Benbow v. Cook, 115 N. C., 324; 44 Am. St., 454.

(d) When a party assumes the burden of showing irregularity in the call or manner of holding a meeting of stockholders, the action of the meeting will nevertheless be declared valid when it appears that every stockholder who did not participate in the meeting afterwards ratified the action.

Benbow v. Cook, *supra*.

Stulz v. Handley, 41 Fed., 531.

Nelson v. Hubbard, *supra*.

Reed v. Hayt, 17 N. E., 418.

4. An estoppel *in pais* has been established against every shareholder in the Trust Company to complain of the sale of the stock in controversy to the appeallant Cutting; and the plaintiff appellees, and the appellee Trust Company are equally guilty of laches.

Oil Co. v. Marbury, 91 U. S., 587, 589.

Gas Co. v. Berry, 113 U. S., 322.

Hanchet v. Blair, 100 Fed., 817.

Hayward v. National Bank, 96 U. S., 611.

Grymes v. Sanders, 93 U. S., 55, 62.

Mackall v. Casilear, 137 U. S., 556, 566.

Mastin v. Noble 157 Fed., 506, 509.

Johnson v. Standard Mining Co., 146 U. S., 360, 371.

Penn Mutual Life Ins. Co. v. Austin, 168 U. S., 685, 697.

Arbuckle v. Kelly, 144 Fed., 277.

## Argument

### THE RIGHT OF PLAINTIFFS TO MAINTAIN THIS SUIT

In the discussion of Point 1, the several sub-heads can be conveniently grouped together. The last sentence of Rule 27 governing stockholders' bills, and which reads as follows:

"It (the bill) must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the stockholders, and the causes of his failure to obtain such action, or the reason of not making such effort,"

is directly referable to the earliest English precedents in such cases. These cases are collected and approved by the Supreme Court of the United States in *Hawes vs. Oakland*, 104 U. S. at pp. 456, 457 and 460. Mr. Justice Miller cites with approval and quotes at length from the



opinion of *James, L. J.*, in *MacDougal v. Gardiner* (1875) 1 Ch. Div., p. 13, to illustrate the reluctance of the Court to entertain a stockholder's bill in the absence of a clear showing of actual fraud, or that the act of the company is *ultra vires*, on the part of the company *qua* company. We desire to call the attention of the Court to the following language of *Mellish, L. J.* at page 25 of the same decision.

“In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, *or if something has been done illegally which the majority of the company are entitled to do legally*, there can be no use of having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes. Is it not better that the rule should be adhered to that if there is a thing which the majority are the masters of, the majority in substance shall be entitled to have their will followed? If it is a matter of that nature, it only comes to this, that the majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly; and that as I understand it, is what has been decided by the cases of *Mozley v. Alston* and *Foss v. Harbottle*. In my opinion, that is the rule that is to be maintained. Of course, if the majority are abusing their powers, and are depriving the minority of their rights, that is an entirely different thing, and there the minority are entitled to come before this Court and maintain their rights; but if what is complained of is simply that something which the majority are entitled to do has been done or undone irregularly, then I think it is quite right that nobody should have the right to set that aside, or to institute a suit in chancery about it, except the company itself” (the italics are ours).

Rule 27 of the new Equity Rules is the same as the former Equity Rule 94, except for the added provision in

the last sentence "or the reason for not making such effort." Both rules had for their object the promulgation of the doctrine laid down in the *English* cases and in *Hawes v. Oakland*.

In drafting the bill, counsel for the appellees, the Woodwards, attempted to bring themselves within the rule of *Doctor v. Harrington*, 196 U. S., 579, and *Dela-ware and Hudson Co. v. Albany and Susquehanna R. R. Co.*, 213 U. S., 435, setting forth what showing will be considered sufficient to excuse a prior demand for action upon the part of directors or of the stockholders. In our opinion the allegations, upon information and belief, of the complaint that "none of" the directors or officers of the defendant, The Monetary Trust Company, who are above alleged to be under the control of the defendant, Henry C. Cutting, are the bona fide owners and holders of any shares of the capital stock of said company, but that sufficient shares of the stock in said company to qualify said officers in accordance with the by-laws of the company, have been issued to each of them by said defendant, Henry C. Cutting, or through his influence or command, in order that he might control a majority of the Board of Directors of said defendant, the Monetary Trust Company, and its officers" is wholly insufficient for that purpose and is not the equivalent in substance or effect to an allegation, setting forth with the particularity required by the rule, the facts showing that the *stock control* of the corporation is in the hands of Cutting or of interests adverse and hostile to the plaintiffs' demand.

It seems to us to be a confession, by way of a resort to a species of special pleading, that the stock interests are, as is actually the case, as appears on the face of the bill,

split up into divers interests, none of which are alleged to be controlled by the appellant Cutting. The bill alleges that Genl. Hart owned 300 shares of the stock of the Trust Company. In other words, our contention in this respect is that if the bill only alleges that the officers alleged to be controlled by the appellant are owners of no more stock than is necessary under the by-laws of the Trust Company to qualify them, and there is no allegation that the appellant is the owner of a controlling interest in the company, then no excuse is furnished for not demanding action at the hands of the other stockholders. Under the decisions last referred to, facts are either alleged or shown by the proof which make the resort to the stockholders, after a resort to the directors has proved fruitless, a vain and idle act; but in the absence of any such showing, the rule is uniform that the bill should be dismissed for want of equity.

The following from *Hawes v. Oakland*, is quoted with approval in *Corbus v. Gold Mining Co.*, 187 U. S., at page 462:

“He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the Court. If time permits, or has permitted, he must show, if he fails with the directors, then he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it.”

The Court goes further (p. 463) and says:

“It must not be understood that a mere technical compliance with the foregoing rule is sufficient and precludes all inquiry as to the right of the stockholder to maintain a bill against the corporation.

This Court will examine the bill in its entirety and determine whether, under all the circumstances, the plaintiff has made a showing of wrong on the part of the corporation or its officers and injury to himself as will justify the suit. The directors represent all the stockholders and are presumed to act honestly and according to their best judgment for the interest of all. Their judgment as to any matter lawfully confided to their discretion may not lightly be challenged by any stockholder or at his instance submitted for review to a Court of Equity. The directors may sometimes properly waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right. They may regard the expense of enforcing the right of the furtherance of the general business of the corporation in determining whether to waive or insist upon the right. And a Court of Equity may not be called upon at the appeal of any single stockholder to compel the directors or the corporation to enforce every right which it may possess, irrespective of other considerations. It is not a trifling thing to attempt to coerce the directors of a corporation to an act which their judgment does not approve, or to substitute his judgment for theirs."

In *Taylor v. Holmes*, 127 U. S., 489, where a bill in equity was filed to reform a deed given to the corporation, by a stockholder after the charter of the corporation had expired, the Court ruled that such a suit could not be filed without a showing that he had endeavored in vain to secure action on the part of the directors, if there were any, or to have the stockholders elect a new board of directors. The Court said: (p. 492)

"Although the allegation of the bill is that many of the directors are dead, still it is shown that one of them survives, and no assertion is made that there was any application to this surviving director on the part of the defendants for the purpose of instituting any proceedings looking to the rectification of this deed, or for the recovery of the real estate in North



Carolina; nor does it appear that there was any request made to him to bring any action on the part of the company, or to elect other directors, or to obtain any united action in the assertion of the claims now set up."

But whether or not the lower court erred in overruling the defendants' motion to dismiss the bill, in the absence of the proof of the allegations required by the rule, the suit should be dismissed for want of equity.

Venner v. Great Northern Railway, 209 U. S., at p. 54.

The appellant Cutting claims the stock in controversy under an option granted him by the Executive Committee of the Trust Company, composed of the President, Mr. Cutting, the trust officer, Mr. Wernse, and the Chief Counsel, Genl. Hart. The option was signed by Wernse and Hart. Article Xa, of the By-laws of the Trust Company is as follows:

#### "EXECUTIVE COMMITTEE

"1st. For the purpose of facilitating the conducting of the business of this Company, there shall be appointed by the Board of Directors an Executive Committee of three persons.

"2nd. The President and Chief Counsel of the Company shall constitute two of said Committee, and the Board of Directors shall elect the third member of said Committee from their number, or may select such other person as may be deemed for the best interests of the Company.

"3rd. Said Committee shall have full charge of and shall conduct and carry on the business of the Company, and report its actions to the Board of Directors at the meeting of the Board held next thereafter."

At the stockholders' meeting of November 10, 1906, the minutes of which are defective for the lack of a recital

of notice, not only was the option in particular ratified and approved, but all the past actions of the Board of Directors and officers were also confirmed, and by a vote of the stock as follows: Wernse, 505 shares; Morgan, 65 shares; Betz, 55 shares; Cutting, (by Wernse proxy) 753 shares; the proof shows Morgan to have purchased his stock at par for cash; Betz is shown to have been one of the original incorporators of the Trust Company, and a member of it long prior to the time when Cutting first became connected with it. This is important to consider from the standpoint of the necessity that the plaintiffs were under to resort to the stockholders for relief before instituting the action in their own names (Trans. p. 203; Plff's Ex. D. S. of E., p. 170).

A more important point in regard to the validity of the transactions had at this stockholders' meeting grows out of the consideration of a principle uniformly adhered to both in England and this country, *viz*: that there is no fiduciary relation between a stockholder and the corporation, and he may vote to ratify a contract between himself and the corporation.

4 Thompson on Corporations, Secs. 4465, 4467.

Northwest. Transp. Co. v. Beatty, L. R., 12 App. Cas., p. 589.

Gamble v. Queen's Co. Water Co., 123 N. Y., 91; 25 N. E., 201.

Oil Company v. Marbury, 91 U. S., 587-589.

Hanchett v. Blair, 100 Fed., 817.

Gas Co. v. Berry, 113 U. S., 322.

The English Court lays down the rule as follows:

“Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally compe-

tent to deal is binding upon the minority, and consequently upon the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject-matter opposed to, or different from, the general or particular interests of the Company.

“On the other hand, a director of the company is precluded from dealing, \* \* \* on behalf of the company with himself, and from entering into engagements in which he has a personal interest conflicting, or which may possibly conflict with the interest of those whom he is bound by fiduciary duty to protect; and this rule is applicable to one of several directors as to a managing director. *Any such dealing or engagement may, however, be affirmed or adopted by the Company, provided such affirmance or adoption is not brought about by unfair or improper means, and is not illegal or fraudulent or oppressive toward those shareholders who oppose it*” (pp. 593, 594).

In *Gamble v. Queen's County Water Co.*, *supra*, the Court speaking through Mr. Justice Peckham, says:

“A shareholder has a legal right, at a meeting of the shareholders, to vote upon a measure, even though he has a personal interest therein, separate from other shareholders. In such a meeting each shareholder represents himself and his own interests solely, and he in no sense acts as a trustee or representative of others. The law of self-interest has at such times very great and proper sway.”

The whole subject we have been discussing has been caught up in one comprehensive statement of the law in the House of Lords decision in *Burland v. Earle*, L. R. App. Cas. (1902) at p. 93, when the Court, speaking through Lord Davey, says:

“It is an elementary principle of law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company, the action

should *prima facie* be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss v. Harbottle* (1843), (2 Hare, 461) and *Mozley v. Alston* (1847), (1 Ph., 790), and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule, where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the Courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious in such an action, the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such action are, therefore, confined to those in which the acts complained of are of a *fraudulent character or beyond the powers of the company*. A familiar example is where the majority are endeavoring, directly or indirectly, to appropriate to themselves money, property, or advantages, which belong to the Company, or in which the other shareholders are entitled to participate, as was well alleged in the case of *Manier v. Hooper's Telegraph Works* (1874), (L. R., 9 Ch., 350). It should be added that no mere informality or irregularity which can be remedied by the majority will *entitle the minority to sue if the act when done regularly would be within the powers of the company and the intention of the majority of the shareholders is clear* (the italics are ours).

The <sup>in</sup>plaintiffs' case below was tried upon the theory laid down in *Curtin v. Salmon Railroad Company*, 130 Cal., 345, which in turn rests upon the doctrine laid down in *Wickersham v. Crittenden*, 93 Cal., 17, to the effect that a stockholder may sue in the right of a corporation to set aside a transaction that is *only constructively*



*fraudulent*, without reference to the ultimate fact that such transaction is not only subject to ratification, but may have in fact been already legally ratified and confirmed. The vice of the California doctrine and virtue of that laid down by the *English* cases and those of the United Supreme Court already cited, will be clearly discerned upon reference to the subsequent case of *Wickersham v. Crittenden*, 110 Cal., 332.

In the original case of *Wickersham v. Crittenden*, it appears that the complainant alleged that <sup>Mr. S</sup>~~he~~ controlled majority of the shares of stock of the Bank of San Louis Obispo, and by virtue of such control he had elected a biddable board of directors, and that at a meeting at which only three out of five directors were present including Mr. Crittenden, a resolution was passed increasing his salary as President; and the Supreme Court of California held upon demurrer to the complaint that the resolution was illegally passed and the transaction could be set aside and vacated at the suit of a stockholder. Following this decision a second action, entitled "*Wickersham v. Crittenden*," 106 Cal., p. 327, was sustained to compel Mr. Crittenden to account for the excess salary he had drawn under the authority of the invalid resolution. Finally, in the case of *Wickersham v. Crittenden*, 110 Cal., p. 332, the Court sustains the defense of Mr. Crittenden to the action to recover the excess of salary, based upon the doctrine of ratification and estoppel.

In the first *Crittenden* case, the Court arrives at the conclusions that the stockholder may invoke the same remedy which the corporation might, to set aside a transaction which is only constructively fraudulent, from a consideration of the most common equitable doctrine that

Courts will set aside such transaction at the mere option of the *cestui que trust*. Such a doctrine, however, has no application in stockholders' suits because of the recognition which the Courts give to the right of the Board of Directors, in the absence of actual fraud, to ratify and approve such illegal transactions *ad libitum*. This, we respectfully submit, is the doctrine laid down in *Hawes v. Oakland* and *Corbus v. Gold Mining Company*, and it is unquestionably the doctrine of the *English* cases to which the Supreme Court of the United States expressly refers as being its intention to follow (104 U. S., at p. 460).

It seems to us that these propositions are merely corollaries to the principal proposition that a stockholder's suit is purely representative in its nature and can be maintained only to enforce the right of the corporation. The most discursive treatment of this doctrine that we have seen, is found in the case of *Turner v. Markham*, 155 Cal., pp. 569, 570, 571, and, since it bears so particularly upon the facts in the suit at bar, we will quote from Mr. Justice Henshaw's opinion at some length:

"At the threshold of this inquiry, however, it is proper to pause to point out what is the exact nature of the action before us. In its essence it is an action brought by the corporation itself to recover redress for some legal wrong before us. In its essence, it is an action brought by the corporation itself to recover redress for some legal wrong which the corporation itself has suffered. To prevent a failure of justice, as where the governing Board of Directors or trustees of the corporation refuses to prosecute such an action, the law permits a stockholder to begin and maintain it on behalf of the corporation. But the fact that a stockholder is the nominal plaintiff in such an action, whether he prosecutes it as an individual stockholder or as a repre-

sentative of a class of disaffected stockholders, does not in any manner, or to the slightest extent, enlarge the rights and remedies of the action. The action must still be founded upon some wrong which the corporation, as a corporation, has suffered, and for which, if itself were plaintiff, it could secure legal or equitable redress. Therefore, if the evidence shall establish that the corporation itself has suffered no wrong, cognizable either at law or in equity it will matter not how just and how grievous may be the complaint of the individual stockholder, nor how complete may be the proof of his personal loss, damage or injury. In this action on behalf of the corporation no recovery can be had, and the stockholder will be compelled to proceed by his individual action to obtain a personal recovery (5 *Pomeroy's Equity Jurisprudence*, 3 ed., p. 2125, *et seq.*; *Cook on Stockholders and Stock*, Sec. 692; *Davenport v. Dows*, 18 Walls., 626; *in re Ambrose, etc.*, L. R. 14 Ch. Div. (Eng.), 590; *Langdon vs. Fogg*, 18 Fed., 5; *Stewart vs. St. Louis R. R. Co.*, 41 Fed., 756; *Foster vs. Seymour*, 25 Fed., 65).

“No conflict arises, or indeed could arise, over so plain a proposition, and it may seem superfluous thus to emphasize it. But it is here emphasized: 1. Because it is all important and to be continually borne in mind in considering the evidence; and, 2. Because of the conviction which an examination of that evidence forces upon us, that, by oversight the learned judge of the Trial Court failed to carry this distinction throughout the case, and erroneously confounded the wrongs and equities of the individual stockholders with the wrongs and equities of the corporation.

“Stripped to its essentials, what then was the condition at the time of the organization of the defendant corporation? It was this: There stood a corporation owning no property, whose stock was, therefore, absolutely valueless. It was perfectly legal and proper for all the parties in interest in such a corporation to do as here they agreed to do—sell all or any part of the stock of the corporation in return for mining claims, or for anything else of value.”

With reference to the law governing stockholders' suits generally, we invoke the familiar doctrine that the Courts of the United States will not follow the rules adopted by the state courts in applying principles of general equity jurisprudence, where the jurisdiction of the Court is invoked upon the ground of diverse citizenship.

Johnson v. Waters, 111 U. S., 640-667.

Arrowsmith v. Gleason, 129 U. S., 86-99.

Marshall v. Holmes, 141 U. S., 589-598.

McDaniel v. Traylor, 196 U. S., 415.

See also

Rapple v. Dutton, 226 Fed., 430-433 and cases cited.

#### RATIFICATION, ESTOPPEL and LACHES.

Before taking up these questions, in detail, we desire to call the attention of the Court to the fact<sup>that</sup> the allegation of the complaint that the plaintiff, Henry J. Woodward, is the equitable owner of 600 shares of stock in the Trust Company has only the oral uncorroborated testimony of the witness Mayo for its support; neither was there any other proof offered of the legal ownership of the five shares of stock alleged to be in his co-plaintiff, Francis A. Woodward. The plaintiffs, residents of Illinois, were not present at the trial, and their depositions were not taken. In this state of the record, we urge that a case is presented for the application of the rule requiring the testimony of two witnesses, or the testimony of one witness, and corroborating circumstances equivalent to another, to overcome a sworn denial in an answer.

Vigel v. Hopp., 104 U. S., 441.

Morrison v. Durr, 122 U. S., 518.

Latta v. Kilbourne, 150 U. S., 524.

The plaintiffs are shown by the record to be cousins of the witness Mayo, who states he sold them the interest



in the Trust Company as alleged in the complaint before Mr. Cutting is shown to have undertaken to buy the \$10,000 worth of bonds of the Land Company under his contract with Reichart, dated May 3d, 1905. If the Woodwards were, in fact, the purchasers of this stock, it was unloaded upon them by Mayo at the time the original stock was outstanding, and he took their money from them when there was nothing back of the stock except the contracts, options and agreements to furnish business referred to in Gen. Hart's letter of proposal. Again the cash book and journal of the Trust Company show how Mayo paid in his money for the stock standing in his name and these payments, made at the time and in the manner shown by the books of the Trust Company, are utterly incompatible with his testimony that he paid for the stock with \$5,000 cash sent him by Henry J. Woodward.

His testimony on this subject is as follows:

"Mr. Whitmore: State the facts in reference to the acquisition of that stock by you.

"The Court: The ownership of the stock.

"A. When the company was incorporated by General Hart and myself, we were the owners and promoters of the company; it was agreed that we should each take 500 shares of promotion stock for our services in incorporating the company, and that we were to have the privilege of buying 500 more shares at \$10 a share. I told General Hart that I had a client in Peoria, Illinois, that would take my 500 shares, and give us \$5,000 for it, a Mr. H. J. Woodward; he sent me \$5,000 and I paid it over to the company for the 500 shares.

"Q. Then these 500 shares of stock belong to H. J. Woodward? A. H. J. Woodward, yes, one of the plaintiffs in this case. He resides in Peoria, Illinois. The other 105 shares belong to me. 500 shares belong to M. H. J. Wood-

ward, and five belong to Mr. F. A. Woodward, and 105 to me. For Mr. H. J. Woodward I paid in \$3,000 in one thousand-dollar payments. I turned over to the company General Hart's note for \$1,000 secured by 300 shares of the stock of the Monetary Trust Company, and for Mr. Woodward I paid in another \$1,000 in payments at different times when the company needed the money. On my account, for my own hundred shares, I paid in \$1,000, in payments at different times."

The entries which we have taken from the cash book and journal, show payments aggregating \$4247.20 to have been made by him as follows:

JOURNAL SHOWS THAT H. B. MAYO paid to MONETARY TRUST Co. the following:

1904

March 26.	Incorporation Expense	\$ 57.50
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JOURNAL SHOWS THAT H. B. MAYO paid to MONETARY TRUST Co. the following:

1904

April	1. Office rent	125.00
	30. Telegrams	11.75
May	2. Sundries	4.70
"	2. Office Furniture	360.00
"	31. Marconi stock	850.00
"	31. Telegrams	3.25

1905

Feb.	28. Wm. H. H. Hart, note	1,000.00
"	" Interest accrued	210.00

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\$2,622.20

CASH BOOK SHOWS H. B. MAYO paid to MONETARY TRUST Co.

1904

June	2. Cash	\$ 200.00
"	11. "	1,000.00
"	30. "	30.00
Oct.	26. "	25.00

1905		
Jan.	10.	“ 300.00
Feb.	1.	“ 100.00
		<hr/> \$1,655.00

1904		
July	1.	Paid to H. B. Mayo check #17 30.00
		<hr/> \$1,625.00

TOTAL	<hr/> \$4,247.20
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The stubs of the stock certificate book (S. of E. pp. 255-270) show that between the date of the organization of the Company and January 9th, 1905, the latter date being at least three months before the initial financing of the Land Company was undertaken by Mr. Cutting by the purchase of the \$10,000 worth of bonds in question—the following amounts of Trust Company stock were issued to Mayo: March 26, 1904, 5 shares; March 30, 1904, 50 shares; January 9, 1905, Certificate No. 12, 100 shares; Certificate No. 14, 160 shares; Certificate No. 15, 220 shares; Certificate No. 16, 90 shares: Total, 505 shares; 400 shares, issued as above, were evidently issued upon the surrender and cancellation of certificate No. 13 for 400 shares on January 9, 1905. The stock book shows no other stock issued to Mayo after that date. Had Mr. Mayo made the payments on this Trust Company stock with money paid him by the Woodward, he would have been entitled to 300 shares more stock paid for at three different times in installments of \$1,000.00 in cash. It is too great a tax upon one's credulity, we respectfully submit, to assume this to be true, for there is not a scintilla of evidence on the part of Mayo that there is any stock due either him or the Woodward; in fact, while they to-

gether claim 610 shares, the stock certificate book shows that only 510 shares were ever issued; 505 shares to Mayo and 5 shares to Francis A. Woodward, *with no testimony whatever in the record, that the latter continues in the ownership of his stock.* There is no presumption to be indulged that after the policy of the company was changed in the matter of not issuing stock except as paid for there is any more stock coming to Mayo; especially since the stock already issued to him amounts to more than his payments.

It was not until March 27, 1905, nearly three months later, that the Trust Company became vested with any tangible stock interest in the Land Company, when it received 1175 shares, or one-quarter of the whole authorized issue after deducting the qualifying shares to directors and the Lewis stock. Mayo claims he was a partner of Reichart in obtaining the original contract of purchase of the Point Richmond lands from the Mintzer and Tuxbury estates. This is conclusively negated by the fact that if he had been he would have insisted on putting this interest in with the Monetary Trust Company and have demanded the issue to himself of promotion stock at the time Wernse and Hart obtained theirs in consideration for turning in the El Dorado Gold Dredging Company's stock (minutes of meeting of Directors of Trust Company, January 7, 1905). This transaction was had at a meeting at which Mayo was present and two days later we find him accepting the issuance of approximately 450 shares of Trust Company stock for which he had already paid cash. At that meeting the following resolutions were unanimously adopted:

“H. B. Mayo proposed to the Board of Directors to turn in on account of his subscription, the note of



W. H. H. Hart, for one thousand dollars (\$1,000) together with the accrued interest credited to him on account of his subscription for five hundred (500) shares of the Capital Stock of the Company and that he would pay sufficient more to make full payment for the said five hundred (500) shares at Ten Dollars (\$10) per share together with what he had already paid. Said note of W. H. H. Hart to be secured by one hundred thousand (100,000) shares of Eldorado Basin Gold Dredging Company's stock and three hundred (300) shares of the capital stock of the MONETARY TRUST COMPANY.

"Upon motion of W. J. Morgan seconded by F. A. Woodward the resolution was unanimously adopted.

"Be it further resolved that the President and Secretary of this Company be and are hereby authorized to issue eleven hundred and fifty shares (1,150) of stock for one hundred thousand (100,000) shares of Eldorado Basin Gold Dredging Company's stock transferred to this Company the                      day of                      . Said stock being taken at the rate of eleven and one-half (11 1/2) cents per share.

"Upon motion of W. J. Morgan seconded by F. A. Woodward the resolution was unanimously adopted" (Minutes of Trust Co., Jan. 7, 1905, S. of E., p. 190).

It is a noteworthy fact that the plaintiff, Francis A. Woodward was present at that meeting.

In the light of the foregoing, we have no hesitancy in characterizing the following testimony of Mayo and the inference he would seek to have drawn from it as being absolutely devoid of truth:

"The Court: Q. But you say that the 1,000 shares of so-called promotion stock, that went, 500 shares to you and 500 shares to General Hart, was afterwards cancelled. A. When Mr. Cutting came in he objected to that, and I consented that my interest in it be cancelled; that is, he returned to the treasury. While I had put in the Point Richmond proposition into the Monetary, which was the only piece of business they ever had that brought them anything that amounted to anything yet, at the same time Mr. Cutting was willing to allow Mr. Hart to put

in 100,000 shares of El Dorado Basin Gold Dredging Company stock which we all knew at the time was absolutely worthless; General Hart was allowed to put that certificate in there at a certain figure and take out Monetary stock for it, which allowed him his promotion stock, but I was not allowed mine.

“The Witness (Continuing). Mr. Woodward sent me that \$5,000 at the time the first payment was made of \$1,000 into the Monetary; I think all my payments were in checks; I have not the checks; it was before the fire, and the checks were destroyed in the fire so that I have not got any of them. I saved absolutely no books showing the payments” (Trans. p. 179).

The witness Mayo further contended that the plain agreement between Reichart and the Trust Company by which the latter received 1,175 shares of Land Company stock in consideration of all claims for past services, and Mr. Cutting’s subsequent agreement to buy \$10,000 worth of the Land Company’s bonds, included the wholly indefinite, uncertain and indefinable stipulation on the part of Cutting to further finance the Land Company when the proceeds from the sale of those bonds had been exhausted, and he alleges that the consideration for such a promise on the part of Cutting was the turning over to him of a controlling interest in the stock of the Land Company. Now, the fact is and must have been known by Mayo at the time he so testified (Trans., pp. 147, 174, 175) that Mr. Cutting never received but 2,350 shares of bonus stock from Reichart at the time of the purchase of \$10,000 worth of bonds on May 3, 1905 (Trans., p. 189). Had Cutting controlled the 10 shares of qualifying stock in each of the directors, he would have had but 2,406 shares out of the 2,501 shares necessary to control the Land Company at the time Mayo testifies he agreed to carry an indefinite obligation to finance the Land Com-

pany in behalf of the other stockholders. Such an agreement would obviously inure to the benefit of Reichart who had 1,175 shares left and to the Lewis stock 250 shares as well as to the 1,175 shares owned by the Trust Company. In other words, the same claim could have been made by these interests when Cutting, on August 29th, 1906, took the option on the Reichart stock at \$1.00 per share and an option from Dr. Lewis on November 5th, 1905, at the same price. It appears inferentially that he did not exercise these options until February 28th, 1906, after he had bought the Trust Company stock in December 20, 1905, from the fact that on that date he had issued to him 4,977 shares of Land Company stock in one certificate (Stock Certificate book of Land Co., S. of E., 279).

The entire record shows that Cutting dealt openly with the Trust Company in the transaction of December 20th; all of the directors, including Morgan and Betz, who are shown to have been disinterested parties, the one a purchaser of his stock in the Trust Company for cash, and the other an incorporator and director from the date of its organization, had knowledge of it. Mayo, though not present at the meeting, learned of it the next day according to his own testimony; (Trans., p. 146), and learned that the company, having no immediate use for the money, would probably loan it back to Mr. Cutting. Mayo has been a director of the Trust Company from the date of its organization to the present, except for a period of about four months from January to April, 1905, during which time the transaction respecting the transfer of 1,175 shares of stock from Reichart to the Trust Company took place, and of this

he had full knowledge and notice as he expressly admits. His testimony in this regard is as follows:

“Q. Now, I find here on page 27 of the minute book the following: ‘Meeting of the Board of Directors of the Monetary Trust Company, held at the office of the company, March 27, 1905, pursuant to notice.

“ ‘Present: H. C. Cutting, President; W. J. Morgan, Vice-president; Fred Reichart, and Albert Betz, Secretary.

“ ‘Absent: F. A. Woodward, who had been duly notified of the time and place of the meeting. A quorum being present the president called the meeting to order.

“ ‘Mr. Morgan offered the following resolution:

“ ‘Whereas, the executive committee of this company some time ago entered into an oral arrangement with Mr. Reichart, who was then not a director of this company, in connection with the carrying out of the Point Richmond Canal & Land Company’s project; and

“ ‘Whereas, this company having by reason of its inability to sell bonds of the Point Richmond Canal & Land Company, and for the further reason that the Hackett Dredger could not do the work, failed to carry out its part of the agreement with said Reichart; therefore, be it.

“ ‘*Resolved*, That in consideration of said Reichart transferring to the Monetary Trust Company 1,175 shares of the capital stock of the Point Richmond Canal & Land Company, said Reichart and said canal company are hereby released from transferring any further shares of said stock in this company, the consideration for said shares so transferred being for past services rendered by this company, and for such services as it may be called upon to render in the future.’

“ ‘A. That was in pursuance of the arrangement that was finally made as to how the Point Richmond stock should be divided. Mr. Cutting took control of it and received 50 per cent and more of the stock without any expense himself, and Mr. Reichart intended to retain one-quarter, and the Monetary was given one-quarter.



“Q. (Reading) ‘Said resolution being duly seconded was unanimously adopted. Mr. Fred Reichart informed the Board of Directors of this company that, having failed to carry out its arrangement with the Point Richmond Canal & Land Company, said arrangement had become null and void; and, thereupon, on motion of W. J. Morgan and second of Albert Betz, upon vote of Cutting, Morgan and Betz said arrangement was declared null and void; Mr. Reichart being excused from voting. There being no further business before the board, the meeting upon motion duly made and seconded, adjourned.’

“The Court: What was that that was revoked, that had never been carried out.

“Mr. Hart: The original contract for the purpose of carrying out the canal business, the business of the canal company.

“The Court: What contract?

“Mr. Hart: The oral contract, as they state here, that the Monetary Trust Company was to raise the funds for the purpose of improving the property. As a matter of fact, if your Honor please, there never was any contract in writing on that subject, so far as I know.

“Q. Do you know of any, Mr. Mayo? A. No; that arrangement that you have just read from the minutes superseded all previous arrangements, as I understand it; the Monetary was given this one-fourth; Mr. Cutting one-half and Mr. Reichart got his one-quarter. That was the end of the proposition. That was the way by which the Monetary Trust Company became the owner of this 1,175 shares of the Canal Company stock. From that time on the Monetary performed its services and was not required to do anything further. If I was at the meeting, I was aware of the passage of this resolution.

“Q. Well, it was on March 27, 1905.

“The Court: Was he present at the meeting?

“Mr. Hart: He had resigned at the meeting of January 7th. I am asking him if he was aware of that fact.

“The Witness: I consented to that distribution of the stock. I do not remember how much stock Mr. Cutting got at that particular time—actually got of the canal company. I know he was given control;

by that, I mean he got a majority. I don't know how the stock was issued. I know the arrangement we reached at the time."

The minutes show that Mayo was present at the annual meeting of stockholders held November 10, 1909, and that he was unanimously elected to the Board of Directors of the Trust Company. No annual meeting of the stockholders of the Trust Company appears to have been held in 1908. But at the meeting in 1907, held pursuant to printed notice, and with a majority of the stock represented, "The minutes of the former annual meeting were read and approved." The "former annual meeting" refers to the meeting of stockholders for the year 1906, called pursuant to a resolution passed at a meeting of the Board of Directors held on September 3d, 1906, (S. of E., p. 193), and being the annual meeting to which the minutes of the stockholders' meeting of November 10, 1906, held "pursuant to adjournment" may be properly referred. Here we find, therefore, in the minutes of the stockholders' meeting of September 28, 1907, legally called and convened, an express ratification of the transaction whereby the option previously given by the Executive Committee to Mr. Cutting to purchase the stock in controversy was ratified and approved, and whereby "all the actions" of the Board of Directors and its officers since the last stockholders' meeting to the date hereof, "were likewise" unanimously ratified, approved and confirmed.

#### ESTOPPEL AND LACHES.

It will not be denied that within a few months follow-

ing the transfer to Cutting by the Trust Company of the 1,175 shares of Land Company stock in question, Cutting entered into the possession of the real property at Point Richmond, and while the same was of little or no value over and above the mortgage indebtedness represented by the bonds held by the Mintzer and Tuxbury estates, commenced the expenditure of large sums of money in its improvement. The testimony of Cutting is undisputed in the record that he spent over \$50,000.00 upon the land before any sales of lots were effected (Trans., p. 203). In all, through his efforts, some \$150,000 has been spent in improving the property, since he has acquired, as he has thought, all of the issued capital stock of the Land Company. His testimony in regard to the condition of the property in 1906, and at the present time which is also uncontradicted, is as follows:

“Mr. Hart: Q. Did you make estimates of the amount of money that would have to be spent on the property in order to make it of a value greater than the bonded indebtedness? A. Yes. I made such investigation for some time before I purchased the stock. When I say some time, I mean it covered the space of time during the investigation. For the purpose of making the property in a condition that would enhance the value of it at all above the bonded indebtedness, there would have to be a channel dug in there so that shipping could come in and then the property had to be filled so that it would be above the high water line; and of course it would ultimately have to be filled to the city grade, whatever the grade was established by the city. The grade or what is known as the base line had not been adopted at that time. Richmond was not incorporated at that time.

“The Witness: (Continuing.) I made an estimate of the expense of the making of this channel. I went over there a good many times, and figured on it—a lot of times—how to handle it, before I purchased

the stock. I don't think I have ever figured it up exactly, the amount of money that has been spent on this property, but I should think in the neighborhood of \$150,000. I spent the money. The improvements that have been placed upon the property for this expenditure have been a canal cut for a distance of about 3,000 feet. There has been pretty near 100 acres filled in and one street 110 feet wide has been graded for 4,000 feet across the property and the sewers have been put in on some of the streets, and Richmond Avenue on one side of the property has been macadamized up in very nice shape, and then there have been some buildings—there have been two canals built, two side canals. It is a hard matter to estimate the present value of the property, I should think it is worth a million dollars. There has been a good deal of this 100 acres contracted for in lots. The books of the Point Richmond show the sales that have been made. No dividend has ever been paid upon the stock. There is still a bond issue out that is due the 1st of January, 1915. I think about \$40,000 worth of bonds altogether have been paid and cancelled. The remainder are unpaid. They are due the 1st of January, 1915.  
\* \* \* (Trans., pp. 197, 198.)

“The Witness: After I obtained these 1,175 shares of stock it was about six months or about four months before I commenced to operate actively with the Point Richmond Canal & Land Co.

“Q. And when acting actively, you had a sale of the property of the company, didn't you. A. No, not until a long time afterwards; I put in over \$50,000 before there were any sales made; and then they did not amount to anything.

“I did not have a sale in March or April, 1907.

“I had all the stock before I put up the \$50,000. If I had not had it, I would not have put it up. I got all the bonds that were left. I had purchased 27 of the 64 bonds before that.

“Q. When you say you put in \$50,000, you got bonds for all the money you put in, didn't you? A. No; after the bonds were exhausted, I still put up quite a bit of money” (Trans., p. 239).

The character of the work done, and a knowledge of the growth that the City of Richmond which took place



between the spring of 1907, and the date of the filing of this suit (February 19, 1913), of which the Court will take judicial notice, are facts of such notoriety, that it will not be in the mouths of the appellees to claim an ignorance of the changed relationship of the appellant to the Land Company upon which we base our claim of estoppel. Since the appellee has taken over the property of the Land Company, he has contracted for the sale of lots to an amount of about \$500,000, upon which he has received payments amounting to approximately \$75,000 or \$80,000 (Trans., p. 237). Mayo has repeatedly asked him during this period, how he was getting along. In *Penn Mutual Life Ins. Co. v. Austin* (168 U. S., at p. 698), the Supreme Court has said concerning the application of the doctrine of laches:

“The reason upon which the rule is based is not alone the lapse of time during which the neglect to enforce the right has existed, but the changes of condition which may have arisen during the period in which there has been neglect. In other words, where a Court of Equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, or that the intervening rights of third persons may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect.”

It would indeed be difficult to measure the indirect injury already done to the contract purchasers from the Point Richmond Canal and Land Company, and which must of necessity follow from this litigation, if the plaintiffs are allowed to prevail and attempt to force a return of the *statu quo* of 1906, and we urge with great confidence that no such compelling equities have been shown in this case, where neither of the plaintiffs have shown

sufficient interest in the maintenance of the suit to testify in their own behalf, and where neither have supported their allegations that they are the *owners of the stock* in the Trust Company to which they lay claim.

In *Oil Company v. Marbury* (91 U. S., at p. 593), the Court was considering the application of the rule of laches to the case when the complainant sought to have a transfer of oil properties by the corporation to one of its directors set aside. The transfer had been made in 1867 and the bill was filed in 1871. The Court said:

“While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, in which no outlay is made for improvements, and but little change in value, the class of property here considered, subject to the most rapid, frequent and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option, whether they will share its risks, or stand clear of them.

“The case before us illustrates these principles very forcibly. The officers, and probably all the stockholders, who were not numerous, knew of the sale as soon as made. As there was no actual fraud, they knew all the facts on which their right to avoid the contract depended. They not only refused to join the defendant in the purchase when that project was tendered them, but they generally refused to pay assessments on their shares already made, which might have paid this debt.”

Considering the speculative nature of the land transaction in which the Trust Company and its stockholders were engaged before and at the time of the sale of the 1,175 shares in question to Mr. Cutting, the amount of money necessary to develop the property before it could be put on the market, the amount of the encumbrance against it, the interest to be met each year, and the maturity of the bonds on January 1st, 1915, and the oppor-

tunity afforded to and refused by the Trust Company to levy an assessment to carry their share of the expense of improving the property (trans., pp. 227, 228 and 190, 191). The case at bar stands, we submit, on all fours with the case of *Oil Co. v. Marbury*. To the same effect, see *Grymes v. Sanders*, 93 U. S., p. 62.

#### RATIFICATION.

While we desire to stand firmly upon the showing in the record that the sale of the 1,175 shares of Land Company stock by the Trust Company to Mr. Cutting under the option testified to by Messrs. Wernse, Betz, and Morgan has been expressly ratified in the manner just mentioned, we may properly go further, out of an abundance of caution, and urge upon the attention of the Court the fact that the transaction ultimating in the transfer thereof as shown by the minutes of the meeting of December 20, 1906, was subject to ratification by acquiescence and the failure to disaffirm within a reasonable time. There being no proof of actual fraud, all the facts of the case being within the knowledge of all of the stock interests represented by the appellee, The Monetary Trust Company, a legal obligation to pay for the stock having been incurred by Mr. Cutting, likewise with knowledge from the beginning of Mayo, and therefore of the Woodward, if it be held that the record shows that either of them are the legal or equitable owners of any stock in the Trust Company, the implication of a ratification by the lapse of over six years, would seem to be conclusive.

That a ratification will be implied under such circumstances seems to be clear.

In the case of *Reed v. Hayt* (opinion in 17 N. E., 418), the action was by the plaintiff to recover the purchase price of stock, sold and delivered to the defendant under a tripartite agreement between the parties and the corporation issuing the stock, reciting that the plaintiff was the owner of 4,550 shares of fully paid and non-assessable shares of the company. The defendant in his answer set up that the plaintiff was not, and never had been, the owner in good faith of 1,622 shares of the stock; that the same had been issued to plaintiff, the president of the company, in consideration of advances due him from the corporation, under the authority of a resolution of the Board of Directors at a meeting called without notice and at which but three members, including the president, (the plaintiff) out of five were present. The defendant, admitting notice of the facts, took upon himself to sustain the following proposition: (1) There was no consideration for the transfer; (2) it was invalid, because the plaintiff, being a trustee of the company, could not make a quorum, when without him there would be no quorum competent to transact business in the interest of himself personally; and (3) the meeting was invalid for want of notice to all the trustees.

After deciding that the first position was against the fact, the Court says:

“As to the second position, its merits rest upon the fact that the plaintiff, as a trustee, could not act for the company in a transaction in which he received a benefit. This, however, is to be limited by further saying that his beneficiaries could, if they thought it to their interest, ratify his act, or, at their option, avoid it. The company was a party to the agreement in this case, and would be held to have ratified the issuing of the certificate of the shares, if



it were not that their execution of the agreement was made by the plaintiff himself. The company, as appears by the plaintiff's testimony, forthwith went into the control of other persons; the plaintiff resigning, and the defendant taking the office of president. There was no avoidance of the issuing of the shares, and the assent and tacit ratification by the company was guided by the defendant himself. The other beneficiaries were stockholders. None of these have in fact assailed the issuing of the certificate. Whether they might do so in a proper action should be considered in view of the fact that the defendant was to become a stockholder upon performance of the agreement. He did, upon part performance, receive some of the shares of another kind, as to which there was no dispute. At the end of nine months from the making of the contract, he learned the facts of the issuing of the stock, and after that he took the benefit of an extension of time of performance, for such, substantially, was the option that will be hereafter referred to, until the 7th of June. The plaintiff's position, in the mean time, was that he could not enforce his claims against the company for the advances. This made it necessary for the defendant, as stockholder, to avoid at once the action of his trustee, the plaintiff, unless he wished to affirm the validity of the shares. No steps were taken towards disaffirmance, and he consequently, in effect, affirmed. If he did not disaffirm, there is no reason for supporting a defense that some other stockholder might therefore disaffirm. Such a possibility cannot be entertained in favor of the defendant, in view of his own acts."

In the suit at bar, there will be no contention that all of the stock interests in The Monetary Trust Company, including the plaintiffs, if they have any, or Mayo's if they have none, have not remained the same from the time of the sale of the 1,175 of Land Company stock to Cutting in December 20, 1906, to the present time. So far as the Trust Company is concerned, it is bound by the doctrine of ratification for failure to disaffirm, to

the same extent as was the defendant, the then president of the corporation in *Reed v. Hoyt*; and clearly the plaintiff will not, under the authorities previously cited be allowed to maintain an action where the Trust Company could not, against Cutting owning but one-third of the stock. The Court in *Reed v. Hoyt*, continues:

“Similar considerations apply to the third position, that the meeting of directors was invalid for want of notice to them. Besides the mere resolution at the meeting, the transaction had been executed, the plaintiff had received the certificate, and had satisfied his demand against the company. This executed transaction could not be opened by any one, except through the action of a Court of equitable jurisdiction, and it would require that the plaintiff be placed in his original position. So far as the proof of the defendant discloses, every one interested had countenanced or ratified the plaintiff’s dealing with the stock as owner, with a knowledge of the facts, and the action referred to would not lie.”

Again the record of a meeting in the minute book of a corporation is notice to its members (*Ashley Wire Co. v. Illinois Steel Co.*, 56 Amer. St., at p. 192).

Upon plain principles of agency, notice to Mayo was notice to the Woodwards, and in the absence of fraud on the part of Mayo as trustee known and taken advantage by Cutting and none is charged against Mayo by the Woodwards, the *cestui que trustent* are conclusively bound by their own acts of affirmance and acquiescence. Where a trustee deals with and handles trust property as his own—either directly or indirectly, the transaction is not void, but voidable, and it may be ratified by the beneficiaries expressly or by long acquiescence.

*Hammond v. Hopkins*, 143 U. S., 224.

*Hoyt v. Latham*, 143 U. S., p. 553.

*Foster v. Mansfield, etc.*, R. R. Co., 146 U. S., 88, 100.

**THE COURT ERRED IN NOT GRANTING  
THE PETITION OF THE DEFENDANT  
FOR A RE-HEARING**

(Trans., pp. 67-89.)

This suit was tried below by Gen. Hart for both the Trust Company and Mr. Cutting. Near the close of the testimony, Gen. Hart offered himself as a witness to prove the facts surrounding the giving of the option to purchase the 1,175 shares of Land Company stock by the Executive Committee of the Trust Company to Cutting, and he was confronted by the rule of Court which would force him to elect between appearing as a witness and exercising his right to argue the case and he elected the latter.

After the submission of the cause, the defendant discovered an agreement dated March 28, 1905, between The Land Company and Cutting having reference to his negotiations to buy the \$10,000 worth of bonds of that company for improvement purposes. This agreement, together with that between Reichart and Cutting of May 3rd, 1905, both executed following the transfer on March 27th, 1905, of the 1,175 shares of Land Company stock by Reichart to the Trust Company in discharge of all claims of the latter for past services, was newly discovered evidence material to controvert the fact that these bonds were sold Cutting in the manner and form, and under the indefinite terms and conditions testified to by Mayo. Other newly discovered evidence consisted in two pass books showing deposits of money received by the Land Company from Cutting in the sale of bonds under the contracts of March 28th, and May 3, 1905, the one having

been in use to the date of the great fire (April 18, 1906), showing a deposit of \$7,500; and the other in use afterwards showing deposits of money, received from Cutting likewise on account of sales of bonds, to an amount of \$42,000. A satisfactory excuse, we submit, was offered for the failure to produce this evidence at the trial, (affidavit of H. W. Wernse, Trans., pp. 86-89).

General Hart in his affidavit in support of the petition, after stating the facts surrounding the granting of the option, states that upon <sup>to</sup>~~in~~ September or October, 1906, he had seen but little of Mr. Cutting, who had paid but little attention to business matters in San Francisco before some time in 1907; that up to the time of the sale of the stock in question to Mr. Cutting, he had never been his attorney except in a Justice Court case; that his connection with him since has been as counsel for the Land Company, the Trust Company and the Richmond Dredge Company; that he has been aware from the beginning of the transactions in connection with the organization of the Land Company, and well acquainted with the character of its real property as swamp or overflowed land, and that its value depended entirely upon its improvement, and when improved could only become marketable, as the Town of Richmond might grow; and that he knew nothing about the sale of the stock in controversy being questioned up to the time of the bringing of this suit.

While there is a great paucity of detail in the record of those facts which would go to further negative any charge of actual fraud on the part of Mr. Cutting, and to establish an estoppel *in pais* against the Trust Company and the plaintiffs suing its be-



half, to question the validity of the sale at this time, we are satisfied that this should be charged to the learned trial judge who from the first seemed to conceive that the validity of the transaction turned entirely upon the question of constructive fraud, rather than to a lack of zeal on the part of counsel for Mr. Cutting. The fact, however, that General Hart has become a substantial beneficiary of the decree, declaring the Trust Company the owner of 1,175 shares of the Land Company's stock, and as such has been forced into the position of an appellee here, gives us great confidence that our position is well taken that a re-hearing should be granted in order to give the defendant Cutting, in the Court below the fair and impartial trial which it is the spirit of our law should be accorded him. Especially is this true since the position which Gen. Hart assumed in taking charge of the defense is as thoroughly compatible with an honest belief on his part and Mr. Cutting's that the transaction of December 20, 1905, was a fair and proper one, as it is with the contention of the plaintiffs below that it was fraudulent. If, therefore, we have failed in satisfying this Court that the record, as it stands, shows the suit to be without equity, we respectfully request an earnest consideration of our application for a re-hearing.

Without intending anything by way of disparagement of Gen. Hart, (the record he is shown to have made in this case would not justify this on the slightest degree), we nevertheless believe that the same grounds which exist for the rule preventing an attorney or solicitor becoming a purchaser in conflict with his duty to his client, justifies our position in this behalf. As stated by Judge

Deady in *Manning v. Hayden*, 5 Sawyer (U. S.), 360, 381, 16 Fed. Cases No. 9,043, at page 653:

“This rule is alike necessary to preserve the dignity and integrity of the legal profession, and to protect the interests of a dependent and confiding clientage; and in the enforcement of it Courts will not hesitate, because the injury to the client does not fully appear, or a positive intention on the part of an attorney to gain an advantage is not shown.”

### **The Record at no Point Presents a Case of Actual Fraud**

We think it will be conceded by the appellees, the Woodwards, that in order to have made out a case of actual fraud against Mr. Cutting, it was necessary to show by clear and positive proof that Mr. Wernse and Gen. Hart were guilty of *fraudulently* combining with Cutting in the transaction of December 20, 1906, and that in the absence of such proof their case must fall. A party seeking the rescission of a contract upon the ground of misrepresentation must establish his case by clear irrefragible evidence.

Farnsworth v. Duffner, 142 U. S., p. 48.

A Court of Equity will not annul or correct a written instrument for fraud, unless the evidence be clear, unequivocal and convincing; nor can it be done on a bare preponderance of evidence which leaves the issue in doubt.

United States v. Maxwell Land Grant Co., 121 U. S., p. 381.

United States v. Budd, 144 U. S., 154.

United States v. San Jacinto Tin Co., 125 U. S., pp 299, 300.

A suspicion of want of good faith is not sufficient.

United States v. Hancock, 133 U. S., 197.

Hoffman v. Overbey, 137 U. S., 472, 473.

The undisputed testimony of Mr. Cutting is that he did not begin operations in the further development of the property of the Land Company until the spring of 1907, and he did not take Wernse into his employ until that time (Trans. p. 234, 239). He further states in his petition for a re-hearing that at the time of the alleged fraudulent sale, he was a non-resident of California, living, and engaged in conducting a large mercantile enterprise at Tonopah, Nevada; that he had no personal counsel in San Francisco at the time and that Gen-Hart did not become counsel for him until a much later period (Trans., p. 70).

At the trial below much was attempted to be made of the charge that Mr. Cutting had not paid more than an aggregate of some \$1,800 on account of his \$5,000 subscription to the stock of the Trust Company. As previously stated, the Ledger of that company has been lost, but a re-statement of his Ledger account would show the dates and amounts of his payments for stock as follows:

H. C. CUTTING paid to MONETARY TRUST CO. as shown by Cash Book.

1904		
June	9. Cash	\$ 250.00
Sept.	15. "	300.00
Sept.	26. "	239.00
Nov.	30. "	175.00

1905		
March	27.	150.00
April	22.	50.00
"	"	40.00
May	2.	405.00
"	"	40.00

"	"	75.00
"	"	2.25
June	7.	265.00
"	6.	5.00
"	6.	20.00
July	1.	258.50
Aug.	8.	262.85
"	31.	10.00
Sept.	2.	260.00
Oct.	3.	264.00
"	25.	42.50
Nov.	1.	285.00
"	15.	77.50
Dec.	1.	193.60

1906		
Jan.	2.	193.05
Feb.	3.	190.65
March	1.	190.85
April	2.	192.65
May	7.	4.25
"	8.	2.00
"	9.	48.00
"	10.	105.00
June	1.	75.00
July	1.	75.00
Aug.	1.	75.00
Sept.	1.	75.00

Total paid by H. C. Cutting \$ 4,896.65

which, after deducting amounts paid by Morgan on account of his share of office expense and which were credited to Cutting's account as follows:

Moneys paid by W. J. Morgan as shown by Cash Book:

1905					
July	5.	One-half office expense	91.75		
	6.	a/c Exchange	10.00		
Aug	12.	One-half office expense	91.40		
Sept.	2.	" " " "	92.75		
Oct.	14.	" " " "	82.00	367.90	
				<hr/>	<hr/>
					\$4,528.75



shows that the latter has paid in \$4,528.75 on account of his subscription. We have heretofore called attention to the fact that for this stock has been issued to the amount of only 448 shares. The par value of Trust Company stock is \$10.00 per share.

Much will no doubt be attempted to be made of the fact that the Board of Directors loaned back to Mr. Cutting the money evidenced by his check for \$1,175 given at the time of the purchase of the stock in question; as well as of the loan of \$1,093 which the Company received from the transaction with the Pacific Underwriting and Trust Company.

There are two answers to this: First, it would be a travesty upon business organization generally to treat these transactions on a par with those of legitimate trust companies ~~generally~~. The form of its original organization, with which Mr. Cutting was not concerned, the fact that in general it has not engaged in a trust company business since its organization, must, it seems to us, be taken into consideration as lessening the offense of the Trust Company in making an unsecured loan to its President. Besides this, the character of Mr. Cutting's credit may be taken into consideration where the record shows, as it does here, his ability to finance as heavy a matter as the Land Company in the manner shown. Mr. Cutting's instinct of conservatism is also illustrated by his forcing the cancellation of the former issue of promotion stock of the Trust Company to which allusion has previously been made. Again the plaintiffs cannot complain, since Mayo knew from the beginning of the proposition to loan Mr. Cutting back the money. The following occurs in the record in connection with his testimony

to the effect that Wernse's services have not been charged to the Trust Company since 1907:

"The Court: Q. After the spring of 1907, his services have never been charged to the Company? A. No.

"Q. It was only prior to that time? A. Prior to that time, and no expense has been charged to the Monetary Trust Company. And the reason why I borrowed the money from the Monetary Trust Company was so as to avoid the expense of having some one to look after it. I owe the money to the Monetary Trust Company, and I am willing to pay it any time it is called for, but I might as well use it and pay 8 per cent" (Trans., p. 234).

We may well conclude this phase of the question by suggesting to the Court that men of large imagination who embark in enterprises such as the development of the canal and harbor project of the Point Richmond Canal and Land Company is shown to involve by instinct are not the mean and petty cheats that the plaintiffs charge Mr. Cutting with being; and we confidentially assert that the record does not contain a scintilla of evidence showing or tending to show that any undue advantage of or oppressive measures against the Trust Company were taken or used by Mr. Cutting to effect the transaction of December 20, 1906.

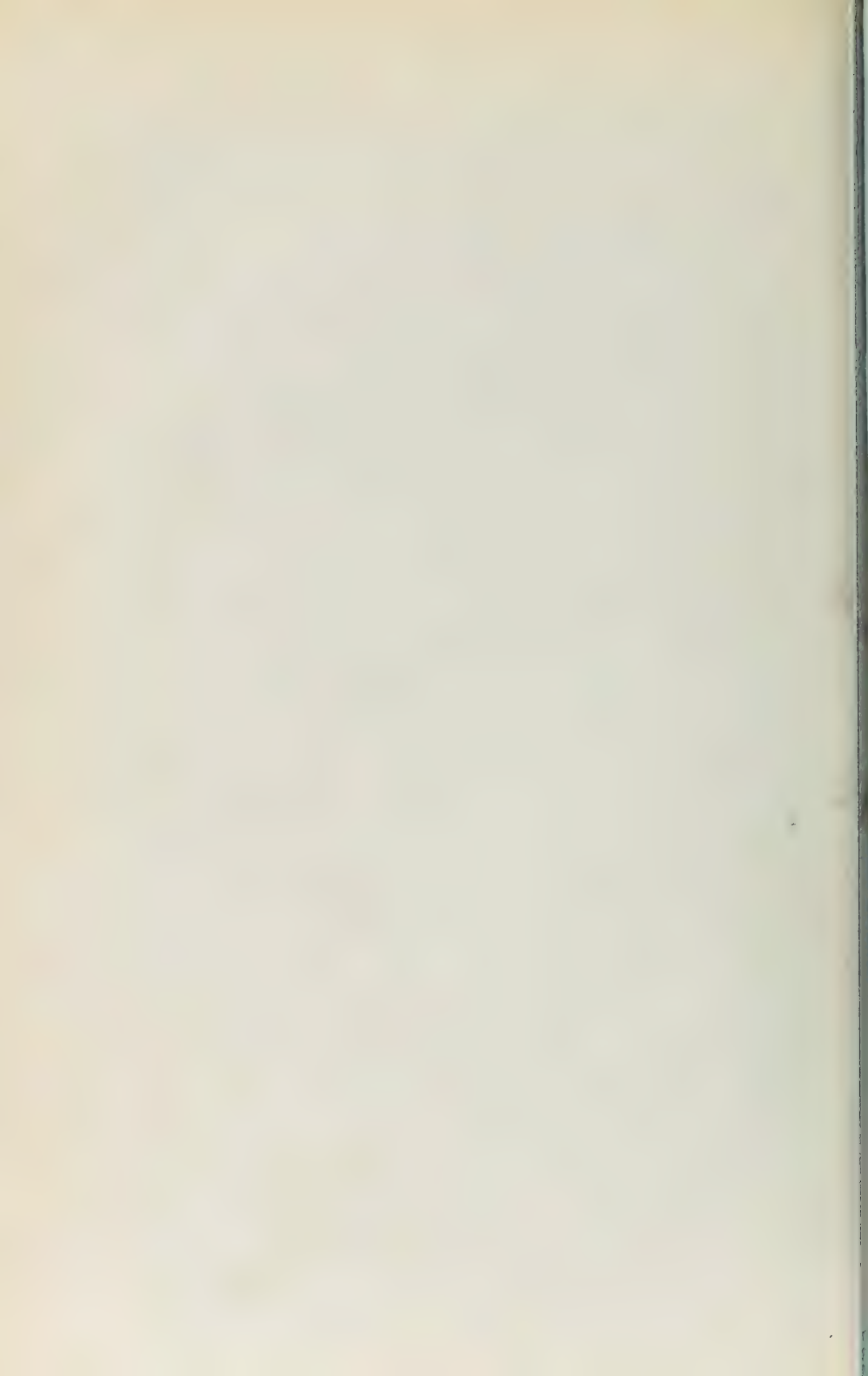
But, in the second place, if the Court should feel that Mr. Cutting's actions in borrowing the funds of the Trust Company are open to criticism, still these actions cannot be considered as proof of actual fraud in connection with the purchase of the 1,175 shares of stock in controversy. Because a party has done wrong at one time and in one transaction, it does not necessarily follow that he has done like wrong at other times and in other transactions.

United States v. Budd, 144 U. S., 164.

Finally, we submit, there is nothing in the whole record which makes out a case of actual fraud entitling the plaintiffs to maintain this suit in behalf of The Monetary Trust Company, either for an accounting or for a decree annulling the sale of the 1,175 shares of Land Company stock in controversy, and we respectfully represent that the bill should be dismissed.

Respectfully submitted,

JACOB M. BLAKE,  
Solicitor for Appellant.





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No. ~~2399~~ 2733

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

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HENRY C. CUTTING,

*Appellant,*

VS.

HENRY J. WOODWARD, FRANCIS A. WOODWARD  
and THE MONETARY TRUST COMPANY (a cor-  
poration),

*Appellees.*

**BRIEF FOR APPELLEES, HENRY J. WOODWARD  
AND FRANCIS A. WOODWARD.**

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JOHN B. CLAYBERG,  
WELLES WHITMORE,  
CLAYBERG & WHITMORE,  
*Solicitors for Appellees, Henry  
J. Woodward and Francis A.  
Woodward.*

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*Filed this*.....*day of March, 1916.*

*FRANK D. MONCKTON, Clerk.*

*By*.....*Deputy Clerk.*



No. 2399

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

HENRY C. CUTTING,

*Appellant,*

vs.

HENRY J. WOODWARD, FRANCIS A. WOODWARD  
and THE MONETARY TRUST COMPANY (a corporation),

*Appellees.*

## BRIEF FOR APPELLEES, HENRY J. WOODWARD AND FRANCIS A. WOODWARD.

Appellant in his "Statement of the Case" has so interwoven matters which have nothing to do with the questions involved on this appeal, with matters relevant to such questions, that, we have concluded to present to the Court a brief statement of the case.

### Statement of the Case.

The action was brought for two purposes:

1. To obtain a decree of the Court setting aside and cancelling as fraudulent the pretended pur-

chase by appellant Cutting from the defendant Monetary Trust Company, of 2350 shares of the capital stock of the Point Richmond Canal and Land Company, and,

2. To obtain a decree of the Court compelling appellant Cutting to account for all moneys, and property of the Monetary Trust Company, which he had received and misappropriated, and directing said Cutting to pay to the Monetary Trust Company the amount found due.

If any questions at all can be considered by this Court on this appeal, they are such only as bear upon the validity of the decree appealed from in so far as that decree decided that the pretended purchase of the 1175 shares of stock on December 20, 1906, was fraudulent and void. The most of the testimony taken on the part of the plaintiffs at the trial of the case was for the purpose of making a *prima facie* case for a decree ordering an account. The accounting was ordered and the matter referred to a Master to take and state the account.

We shall contend when we come to the argument of the case, that the decree appealed from is interlocutory, and not appealable, and that this Court has no jurisdiction to consider or decide any questions raised by appellant.

The bill in so far as the same relates to the attempted sale sought to be set aside as void and fraudulent, alleges briefly as follows:



## I.

The jurisdictional allegations of diversity of citizenship and the amount involved. It also alleges that the action is brought by plaintiffs for and in behalf of themselves and all other stockholders similarly situated who may desire to join in the action.

(Tr. p. 2, par. 1, bill.)

## II.

That this suit is not collusive and alleges in compliance with the requirement of Equity Rule 27.

(Tr. pp. 2-3-4-5, par. 2, bill.)

## III.

The ownership of certain shares of the capital stock of the Monetary Trust Company, and that the Monetary Trust Company is the owner of 1175 shares of stock of the Point Richmond Canal and Land Company.

(Tr. pp. 5-6, par. 3, bill.)

## IV.

That the assumed records of the Monetary Trust Company of a directors' meeting of that company claimed to have been held on or about the 20th day of December, 1906, contains a statement that the following resolution was unanimously passed by the board of directors: "Mr. H. W. Wernse presented the check of H. C. Cutting for \$1175, stating that Mr. Cutting desired to exercise his rights under the option given him by the Monetary Trust

Company, ratified and confirmed by the stockholders at their last meeting, to purchase 1175 shares of the Point Richmond Canal and Land Company held by the Monetary Trust Company at one dollar per share." That the assumed meeting was not a regular meeting of the board of directors; was not properly called in accordance with the by-laws of the company or the statutes of the State of California; that the record of this assumed meeting disclosed that there were present at said meeting only Henry C. Cutting (appellant herein) and directors W. J. Morgan and W. H. Wernse, and that directors Betz and Mayo were absent; that in accordance with the by-laws of said company three directors were required to be present to constitute a quorum for the transaction of any business; that said record disclosed that the above recited resolution was passed unanimously by the vote of all directors present, and that Henry C. Cutting participated in the vote passing the resolution and voted for the same; that under and by virtue of said resolution defendant Cutting claims that he became the bona fide owner and holder for a valuable consideration of the 1175 shares of the capital stock of the Point Richmond Canal and Land Company; that defendant Cutting's vote was necessary to the passage of said resolution; that said Cutting was not a qualified director and not entitled to vote thereon, and could not have counted for the purpose of making a quorum of said directors. That the check of said Cutting so presented to the board was never cashed by the Trust Company, but that the

Trust Company four months later loaned the same amount of money represented by the check to the defendant Cutting and took his note therefor, which note is still outstanding unpaid, and barred by the statute of limitations.

(Tr. pp. 7-8-9, par. 5, bill.)

The bill then alleges that the ratification of the stockholders recited in the record of the meeting of the directors of December 20, 1906, was false and that no regular stockholders' meeting had been held for a long time prior to December 20, 1906; that the entire transaction of the pretended purchase was fraudulent and for the purpose of defrauding the Monetary Trust Company and its stockholders out of the assets of the company.

(Tr. pp. 10-11, par. 5, bill.)

That all the acts and doings of Cutting were fraudulent and intended so to be and were done and committed for the express purpose of cheating and defrauding the Monetary Trust Company and its stockholders out of their rights in any value in the assets of the company; that Cutting purposely, intentionally and fraudulently concealed their fraudulent practices from plaintiffs and the other stockholders by keeping or causing to be kept insufficient or inaccurate books of account and corporate records of the affairs of the company; that such fraudulent acts were not discovered until the month of January, 1913, just before the suit was commenced.

(Tr. pp. 18-19-20, par. 9, bill.)

That Cutting was the president and a director of the Monetary Trust Company at all times mentioned in the bill, and was acting in a fiduciary capacity towards plaintiffs and all the stockholders with reference to the assets, property and business of the company, and that he violated such duties and misappropriated the assets of the company and converted them to his own use and benefit.

(Tr. pp. 20-2, par. 10, bill.)

The allegation of the ownership by the Monetary Trust Company of 1175 shares of the capital stock of the Point Richmond Canal and Land Company was admitted by the answer of the defendants Cutting and the Monetary Trust Company (Tr. p. 37). This being true, the allegations of the complaint setting forth the method whereby the Monetary Trust Company became the owner of this stock, becomes immaterial upon this appeal.

Many allegations of the complaint refer to acts of Cutting and allege facts sufficient to warrant the Court in ordering Cutting to account for the misappropriation of moneys, and have absolutely nothing to do with this appeal.

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### Argument.

#### I.

We contend that the entire decree appealed from is interlocutory in its nature, and not appealable.



Section 128 of the New Judicial Court provides that "the Circuit Court of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts."

Section 129 provides for a review by appeal from an interlocutory decree or order where an injunction shall be granted, continued, refused or dissolved, or an application to dissolve an injunction shall be refused or an interlocutory decree or order shall be made appointing a receiver or an interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve an injunction or appointing a receiver.

By Section 129, therefore, appeals are allowed from certain interlocutory orders, but only in cases where an injunction or receiver are involved. This section gives no authority for an appeal from any other interlocutory order, but all other appeals must be from a final decree.

The decree appealed from is interlocutory in its entirety. It is entitled "interlocutory decree". It does not determine all of the rights of the parties. It finds that the defendant, H. C. Cutting, is not the owner of the 1175 shares of stock of the Point Richmond Canal and Land Company, transferred to him on the 20th day of December, 1906, but it does not direct the return of said stock or make any order in the premises. It orders an accounting only, and contemplates further action by the Court when the report of the Master has been received. There are 1175 additional shares of stock of the

Point Richmond Canal and Land Company involved in the case, the ownership of which has not been determined, and which remains to be determined after the accounting has been taken. In short, there is nothing ordered in this "interlocutory decree" except that an accounting be had. There is no order or direction in the decree capable of being enforced by execution.

The decree appealed from possesses no elements of finality.

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#### DECREE APPEALED FROM NOT FINAL.

"If the reference to a Master is to take an accounting upon which a decree is to be determined, then it is not final."

Simkin's Federal Equity Suit (2nd ed.), p. 660 (citing many cases, among which are):

California National Bank v. Stateler, 171 U. S. (447) 449;

McGourky v. Toledo and Ohio Central Railway Company, 146 U. S. (536) 546-50;

Craighead v. Wilson, 18 How. 201.

A decree to be final must be a complete decision of all matters in controversy.

The final or interlocutory character of a decree depends in some measure upon the peculiar facts and circumstances of each case in which it is rendered.

Many cases on the finality of a decree have been collated and reviewed in the case of McGourky v.

Toledo and Ohio Central Railway Company, *supra*, and in the case of the California National Bank v. Stateler, *supra*. And we call the attention of the Court to these two cases:

McGourky v. Toledo and Ohio Central Railway Company, 146 U. S. (536) 546-550;

California National Bank v. Stateler, 171 U. S. (447) 449.

Speaking on the subject of the finality of a decree in the sense that the same is appealable, the late Chief Justice Taney, in the case of Fagay v. Conrad, in which it was held that the decree was final in the sense that it was appealable, because there was a finding of the ownership of the properties and an order directing the execution of instruments of conveyance and transfers of the property, and a further order for an accounting on certain matters involved in the case condemns the practice of making a final decree before the final determination of all matters involved in the litigation. The Court uses the following language:

“It would certainly have been proper and entirely consistent with chancery practice for the Circuit Court to have announced in an interlocutory order or decree the opinion it had formed as to the rights of the parties, and the decree it would finally pronounce upon the titles and conveyances in contest. But there could be no necessity for passing immediately a final decree annulling the conveyances and ordering the property to be delivered to the assignee of the bankrupt.”

Fagay v. Conrad, 6 How. 201.

We submit that the decree appealed from in this case conforms to the suggestion made by Judge Taney.

The court gave it as its opinion that the transfer of the 1175 shares of stock by the Monetary Trust Company to the defendant H. C. Cutting, was fraudulent and void, and that the stock still remains the property of the Trust Company and makes no order in the premises, but leaves it to a final decree to be rendered when all matters involved in the litigation are determined.

Speaking on this same subject the Court, in *Craighead v. Wilson*, *supra*, gives a rule by which to determine whether a decree is final in that sense that it is appealable and uses the following language:

“To authorize an appeal the decree must be final in all matters within the pleadings so that an affirmance of the decree will end the suit.”

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#### APPEAL SHOULD BE DISMISSED.

Upon an examination of the decree appealed from (Tr. pp. 63-65) and consideration of the cases above cited, we ask the Court to dismiss this appeal for want of jurisdiction.

The appeal is not from a final decree.



## II.

**PROOF OF DEMAND FOR ACTION BY THE COMPANY.**

Appellant has devoted much effort in his brief to show that no demand was made before suit, that the Monetary Trust Company take action to recover the 1175 shares of stock and the money misappropriated by appellant, and we deem it best to reply to this point, notwithstanding the fact that we believe that the appeal must be dismissed.

The allegations of the bill bring us clearly within the requirements of Equity Rule 27. While the record may not show that sufficient evidence was introduced by plaintiffs to support these allegations, yet a perusal of the testimony will clearly disclose, that any effort to procure action by the board of directors would have been unavailing. It is always within the power of the Court to determine on the facts proved whether a demand would have been unavailing.

Dane v. Morgan, 219 Fed. 313.

No demand is necessary in cases where the same would clearly prove unavailing.

Doctor v. Harington, 196 U. S. 579;

Delaware & Hudson R. Co. v. Albany, etc.,  
R. Co., 213 U. S. 535.

If the testimony introduced was of such a character that the Court below may have concluded that a demand for action by the board of directors would have been unavailing, this is sufficient, without proof of a request on the board of directors to act, al-

though such requests are alleged in the bill. The testimony may have been so developed in the trial of the case that counsel for plaintiffs felt satisfied that the proof was so strong that all request for action on the part of the board of directors would be unavailing; that no evidence was introduced to prove a demand.

The Court below must have been satisfied from the proof introduced, either that a proper demand had been made or that no demand was necessary because it would have been unavailing. This must be so because if the court had not been so satisfied, no decree for plaintiff would have been entered. This satisfaction is fully apparent from the assignment of errors of the appellant.

(IV-V-VI of brief, pp. 15-16.)

Immediately prior to the commencement of this suit the directors were Cutting (appellant) Wernse, Morgan, Betz and Mayo. Cutting was the assumed purchaser and Wernse and Morgan the two other directors who consummated the purchase. Wernse had been paid his salary by Cutting for many months prior to December 20, 1906, who charged the same to the Trust Company, although that company was not doing any business whatever. Wernse was evidently Cutting's right-hand man.

(Tr. pp. 106-143, Wernse's testimony.)

Betz never paid anything for his stock (Tr. p. 222). He always voted as Cutting desired (Tr. p. 224). Morgan did not consider \$1 per share a reasonable price for the stock, but he was busy with

other matters, his interest was small, and he says "I just agreed to let it go (Tr. p. 226). Cutting had talked of an assessment and the company had no money (Tr. pp. 227-228). He did not think the proposition a good one, although he entered into it (Tr. p. 230). Morgan could not swear positively that he ever voted against anything that was brought up before the board (Tr. p. 230). Mayo was evidently not recognized by the board. He was living in Sacramento and whenever the board called a meeting they gave him notice. Such notice was generally received after the meetings were held (Record p. 146). If the notice was received in time and he came down to attend a meeting it was postponed (Record p. 143). He had nothing to do with the management of the Trust Company, and cut no figure in anything that was done. He was not allowed in any of the secret counsel of the company; whenever he came into the office where the other directors were together there would be a hush, and nothing was said. His presence always caused a silence (Record p. 176). It was thus apparent that the entire management of the company was controlled by Cutting, Wernse and Betz.

It seems too apparent for argument that the board of of directors, except Mayo, were all controlled by Cutting, and that any request for the board to take action upon this matter would have been unavailing.

When the Court below found the attempted purchase to be absolutely fraudulent and void; it would,

indeed, be a strange rule of equity that would require a stockholder to ask the parties who had been guilty of the fraud to bring a suit for the purpose of disclosing their own fraud, and compelling themselves to make restitution to the company.

*Again*, the fact that defendants H. C. Cutting and the Monetary Trust Company joined together, in a joint answer, to the bill in this cause, *alone* is sufficient proof that a demand on the board of directors of the Monetary Trust Company, for action by that company, would have been futile.

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#### RATIFICATION.

Counsel for the appellant takes the position that the transaction involved in the sale of the 1175 shares of stock to Cutting, was only constructively fraudulent, was subject to ratification and was duly ratified.

Generally speaking any transaction of a corporation or its officers which is within corporate power, may be ratified, but there can never be a ratification of *ultra vires* acts, except as to third person, and then only when the consideration for the contract has been received and is retained by the corporation.

Any act not *ultra vires*, which has been irregularly performed by the officers of a corporation, is not necessarily void but merely voidable, and the irregularity may be waived or the act ratified.



The transaction here involved is, by the court below, held *void and fraudulent*. No rights of third parties intervene,—no consideration has been paid to or retained by the company; therefore no ratification or waiver can exist.

The only ratification by stockholders at a stockholders' meeting, to which attention is called by appellant, is the meeting of November 10, 1906, which only assumes to ratify an option theretofore given appellant Cutting by the executive committee of the company, to purchase the 1175 shares of stock at one dollar per share. This meeting cannot be made a basis for the ratification of anything. On its face it purports to be held "pursuant to adjournment" (Tr. p. 102).

The record of the company contains no minutes of any prior meeting of the stockholders which was adjourned to that date.

On September 3, 1906, a directors' meeting seems to have been held, in the minutes of which is recited a resolution stating that the annual meeting of the stockholders had not been held and announces a call for such meeting to be held on September 29, 1906. And the secretary is directed to make the necessary publication (Tr. p. 104).

Betz says this meeting did not take place (Tr. p. 105). There is no record of it, and as the Statutes of the State, and the by-laws of the company, require minutes to be kept of all stockholders' meetings, there can be no presumption that it was held.

The questions propounded to the witness Betz by the court below are very indicative (Tr. p. 105).

The records of the company contain no waiver of notice of the meeting and no consent to the holding thereof, as required by Section 317 of the Civil Code. The meeting was, therefore, of no force or effect whatever. But again Cutting's man Wernse was present at this meeting and evidently controlled the same. He represented 505 shares of stock personally and 753 shares as Cutting's proxy. The only other stockholder present was Betz, representing 55 shares, which he never paid anything for. It is so evident that it was a Cutting meeting that further comment seems unnecessary.

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#### **ESTOPPEL.**

Counsel for appellant claims that the plaintiffs are estopped from now receiving the relief sought by their bill.

In the first place no estoppel is pleaded, none claimed in the answer and none asserted at the trial of the case. An estoppel cannot be first claimed in an appellate court. Besides this the record is absolutely barren of any evidence upon which an estoppel could be based.

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#### **LACHES.**

Counsel for appellant claims that such laches on the part of plaintiffs is shown by the record, as to bar them from any remedy.

Laches can never be relied upon in case of actual fraud.

*Michoud v. Girod*, 4 How. U. S. 503.

In this case the Supreme Court said:

“In cases of actual fraud courts of equity give relief after a long lapse of time, much longer than has passed since the executors in this instance purchased their testator’s estate. In general, length of time is no bar to a trust clearly established to have once existed; and where fraud is imputed and proved length of time ought not to exclude relief. \* \* \* There is no rule in equity which excludes consideration of circumstances, and in a case of actual fraud we believe no case can be found in the books in which a court of equity has refused to give relief within the life time of either of the parties upon whom the fraud is proved, and within thirty years after it has been discovered or becomes known to the party whose rights are affected by it.”

See also

*McIntire v. Prior*, 173 U. S. 38;

*Saxlehner v. Eisner Co.*, 179 U. S. 19;

*Bryan v. Kales*, 134 U. S. 126.

The above rule has been directly applied to transaction of directors of corporations, similar to those involved in this suit.

*Malory v. Malory, Wheeler Co.*, 23 Atl. 709;

*European, etc., Co. v. Poor*, 59 Maine 281.

It is alleged in the bill that Cutting, since the time of the transaction relative to the purchase of the 1175 shares of stock, has been, and at the time of the

commencement of this suit, was the president and a director of the defendant Monetary Trust Company.

This created a fiduciary relation between Cutting and all the stockholders of the company, and brings this case directly within the authorities above cited.

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#### **MOTION FOR REHEARING.**

Counsel for appellant also claims that the court erred in not granting the petition of the defendant for a rehearing. Such petition amounts to the same thing as a motion for a new trial in a suit at law. It has been the uniform practice of the United States Courts of Appeal, for many years, to hold that no appeal lies from an order denying a petition for rehearing in an equity case, or denying a motion for a new trial in a case at law. Such matters have always been held to be in the discretion of the trial court, and not reviewable on appeal. This rule is so uniform that citation of authorities would seem useless.

Counsel's entire argument is confusing and perplexing for the reason that he has interwoven the question of error in ordering the accounting with his argument upon other propositions, and it is difficult to separate the two.

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#### **ACTUAL FRAUD.**

In the concluding argument of counsel it is claimed that the record discloses no actual fraud on



the part of Cutting, and in support of this argument he refers to the books of account of the Trust Company, introduced in evidence, showing that Cutting had paid into the company a large amount of money. Counsel evidently overlooked the fact that in the interlocutory decree it is ordered that Cutting render an account of the money actually paid upon his purchase of stock of the Monetary Trust Company. This accounting has not been had and the use of the books for the purpose above mentioned is not justified.

He also says "that men of large imagination who embark in enterprises, such as the development of the canal and harbor project of the Point Richmond Canal and Land Company, is shown to involve by instinct, are not the mean and petty cheats that plaintiffs charge Cutting with being." This argument might be of some force before a jury, but, when addressed to a court of last resort, deserves no consideration. Besides this, the accusation by plaintiffs against Cutting is that he has fraudulently procured assets of the Monetary Trust Company of the value of many hundred thousand dollars, and we can see no claim of "mean and petty cheats" involved.

When this court considers that H. C. Cutting had practically operated and controlled the entire affairs of the Monetary Trust Company for a long time prior to December 20, 1906, that he, through his friends and subordinates, attempted to purchase the only available assets of the company at a nominal

price, and that he never paid one dollar upon the purchase, but gave his check, which was subsequently exchanged for a note which has been outlawed for many years, we cannot understand how anyone can come before this Court and claim that his actions in that regard were "clean, open and above board."

Dated, San Francisco,  
March 25, 1916.

Respectfully submitted,

JOHN B. CLAYBERG,

WELLES WHITMORE,

CLAYBERG & WHITMORE,

*Solicitors for Appellees, Henry  
J. Woodward and Francis A.  
Woodward.*

No. 2733

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

HENRY C. CUTTING,

*Appellant,*

VS.

HENRY J. WOODWARD, FRANCIS A. WOODWARD  
and THE MONETARY TRUST COMPANY (a cor-  
poration),

*Appellees.*

## APPELLANT'S REPLY BRIEF.

JACOB M. BLAKE,

*Solicitor for Appellant.*

Filed this.....day of April, 1916.

Filed

APR - 6 1916

FRANK D. MONCKTON, *Clerk.*

F. D. Monckton

By.....Deputy Clerk.





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## APPELLANT'S REPLY BRIEF.

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The appellant does not contend that this is an appeal from an interlocutory order granting or refusing an injunction, or appointing a receiver, under the provisions of Sec. 129 of the Judicial Code, but an appeal from a final judgment upon a separate, distinct and severable issue made by the pleadings as to the ownership of the 1175 shares of Land Company stock, the attempted sale of which by the Trust Company to its president, Mr. Cutting, the Court found to be fraudulent and void and by which *no title or right of property was vested in him*, and, as a result of which *no title or right of property* accrued to him in any income,

dividends, or benefits derived therefrom. We further claim that the second paragraph of the decree directing an accounting as to such income, etc., etc., is an order merely in execution of the final decree, adjudging *the title to the stock* to be in The Monetary Trust Company, and that as the decree now stands it is self-executing, being nothing less than a decree quieting the title to the stock in the Trust Company.

Thompson v. Dean, 7 Wall. 342,

Railroad v. Bradleys, 7 Wall. 577.

The decree upon this severable issue is as follows:

“IT IS ORDERED, ADJUDGED AND DECREED that the contract purporting to have been entered into on or about December 20, 1906, between certain members of the board of directors of the defendant, The Monetary Trust Company, and the defendant Henry C. Cutting, which purports to transfer 1,175 shares of the capital stock of the Point Richmond Canal and Land Company, a California corporation, from the defendant The Monetary Trust Company to the defendant, Henry C. Cutting, was and is fraudulent and void, and vested no title to said shares of stock in said Cutting, but said shares of stock still remain the property of The Monetary Trust Company, and the latter is entitled to have said shares restored to its name upon the books of said Point Richmond Canal and Land Company.

“IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant Henry C. Cutting has no title or right of property in or to the income, profits, dividends, or benefits of any character received by, or derived to the benefit of, said defendant from

or on account of said 1,175 shares of the capital stock of the said Point Richmond Canal and Land Company since the said attempted transfer thereof to said defendant, or while the same has stood in his name; and the plaintiffs, on behalf of said Monetary Trust Company, are entitled to have an accounting from the defendant of all such profits, dividends, or benefits, if any, which have been received or derived by, to, or for the benefit of said defendant from said stock."

Our petition for an appeal is from the decree of October 6, 1915, "and from each and every severable part thereof:" and the order allowing the appeal is in the same terms (Trans. pp. 242 and 249).

The rule determining the finality of a decree in such a case is laid down in the leading case of *Forgay v. Conrad*, 6 How. 201 at p. 204, and many times reaffirmed by the Supreme Court of the United States. It is as follows:

"When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such a decree carried immediately into execution, the decree must be considered as a final one to that extent, and authorizes an appeal to the Court, *although so much of the bill is retained* in the Circuit Court as is necessary for the purpose of adjusting by a further decree, the accounts between the parties pursuant to the decree passed."

In *Thompson v. Dean*, 7 Wall. 342, the decree directed the defendant to transfer to the plaintiff certain shares of stock, and that an account be taken as to the amount paid for the same and the dividends accrued. The Court said:

“In this case the decree directs the performance of a specific act and requires it to be done forthwith. The effect of the act when done *is to invest the transferees with all the rights of ownership. It changes the property in the stock as absolutely and as completely as could be done by execution on a decree for sale. It looks to no further modification or change of the decree. No such change was possible after the term, except on re-hearing or bill of review in the Circuit Court, or through appeal in this court.*” (Italics are ours).

In the case at bar there was no specific act required to be done on the part of the defendant Cutting, for the Court summarily decreed *the title and right of property to be in The Monetary Trust Company.*

We desire to call the Court's attention in this connection to the fact that the trial Court treated the decree as final and entertained and disposed of a petition for a re-hearing within the term in which the decree was entered. The failure to grant such re-hearing upon the ground of accident, surprise and of newly discovered evidence is assigned and urged in this Court, as error.

In *Thompson v. Dean*, the Court concludes:

“The decree for which it was taken decided the right to the property in contest, directed



it to be delivered by defendant to complainant by transfer, entitled the complainant to have it carried immediately into execution, leaving only to be adjusted accounts between the parties in pursuance of the decree settling the question of ownership." (p. 346).

In *Winthrop Iron Co. v. Meeker*, 109 U. S. 180, the bill sought to set aside as fraudulent the proceedings of a stockholders' meeting, as here, and to have a receiver appointed. It was decreed that the meeting was fraudulent, that the lease executed in accordance with the authority then given was void, that a receiver should be appointed with power to continue the business, and that an account be taken of the profits realized from the use of the leased property, and from royalties derived from ores mined by the defendant. It was contended that the decree was not final, because it left undetermined the account of profits thus derived. It was held on appeal that the decree was final because the main purpose of the suit had been accomplished, and that the accounting was ordered in aid of the execution.

In *Hill v. Chicago & E. R. R. Co.*, 140 U. S. 52, the Court had before it a suit in equity to compel a transfer to the complainant of certain shares of the capital stock of the defendant railroad company. It was brought against numerous defendants, who were alleged to be interested more or less in the several contracts and transactions out of which the claim of complainant arose. Issues having been joined by the replication to the answer

a decree was made in June, 1885, dismissing the bill for want of equity against certain defendants and denying relief to the complainant "upon all matters and things in controversy," except as to the amount of money paid by the defendant Gondy for right of way in execution of a certain contract. The decree further declared that for the purpose of ascertaining that amount, the case be retained as to other defendants, and be referred to a Master in Chancery to take additional testimony on that subject, and to report the amount paid; the Court also declaring that on the coming in of the report, it would make such further decree as was equitable. Upon a report of the Master, a decree was made in July, 1887, ordering that the defendant railroad company against whom the suit had been retained should pay complainant forthwith the sum of \$6513, with interest and costs. On an appeal from this later decree, the appellee railroad company sought to open up the matters that had been determined by the decree in June, 1885, no errors being assigned to the decree of July, 1887. In holding the decree of June, 1885, to have been final, the Court said:

"It disposed of every matter of contention between the parties, except as to the amount of one item, and referred the case to a Master to ascertain that. It dismissed the bill against several defendants for want of equity, and denied relief to the complainant upon all matters in controversy, except as to that amount, and retained the case only as against the defendants in that matter. The rights and liabilities

ties of all the parties were in other respects determined.

“But there was no adjudication as to the payment of the amount to be ascertained by the Master; that remained unsettled. It was, however, a severable matter from the other subjects of controversy, and did not affect their determination.

“The decree of June 8, 1885, was appealable as to the matter which it fully determined; so also was the decree of July 14, 1887, as to the severable matter which it involved.”

At the same term, the Supreme Court in *Lewisberg Bank v. Sheffey*, 140 U. S. 445, 452, had the same question before it, and stated:

“It is true, as pointed out by Mr. Justice Field in *Hill v. Chicago & Evanston Railway*, *supra*, that an appeal may be taken from a decree in an equity cause, notwithstanding, it is merely in execution of a prior decree in the same suit, for the purpose of correcting errors which may have originated in a subsequent proceeding. This was so held in *Chicago & Vincennes Railroad v. Fosdick*, 106 U. S. 47, 83, and was the rule sanctioned in *Forgay v. Conrad*, 6 How. 201 and *Blossom v. Milwaukee & St. Paul Railroad Co.*, 1 Wall, 655. *An appeal will lie from such decrees according to the nature of the subject matter and the rights of the parties affected.*” (Italics are ours).

In this case the Court had occasion to determine from the facts in issue whether an interlocutory decree, making an injunction perpetual against parties attacking a sale under a trust deed and which “directed the fund to be brought into Court for distribution” according to the terms thereof, was final, and it was held that it was; that error

assigned to that decree could not be reviewed upon an appeal from the later decree made upon the distribution of the fund; and that a petition for a re-hearing not filed in the trial Court within the term in which the interlocutory decree was rendered, could not be entertained.

In this case we call attention particularly to the fact that a petition for a re-hearing *within the term* was entertained and disposed of, and that error is assigned and the assignment is strenuously urged upon the order denying it. This, we respectfully submit, makes a record strongly in favor of the Court entertaining this appeal in the interest of a prompt and speedy determination of the questions raised upon the petition; for, if the trial below so far as it has proceeded involves a mistrial upon the merits, the sooner that is disposed of, the sooner the ends of justice will be arrived at. Delay, vexation of, and the pecuniary loss to, the interested parties incident upon unnecessarily protracted litigation, will be greatly minimized by a disposition of this question upon this appeal.

In connection with what are material facts to be considered in the defense of a stockholders' suit of this nature, we request a particularly careful examination of Mr. Justice Peckham's decision in *Gamble v. Queen's County Water Co.*, 123 N. Y. 91; 25 N. E. 201. Counsel for the appellees, the Woodwards, lay stress upon the fact that estoppel is not pleaded. The significance of their ready reliance upon this has a very strong bearing upon



the point made by us at the argument of the petition for the re-hearing that it was not to be expected that Gen. Hart's mind would readily run to the pleading and proof of the defense of estoppel by reason of his intimate relationship, as general counsel, to The Monetary Trust Company, and that his failure to raise the issue was and is, from no possible view of this relationship and the proof made of it at the trial, incompatible with the *honest belief on the part of both himself and Mr. Cutting*, that the transaction of December 20, 1906, was honest, fair and above board. This must be so unless the proof of actual fraud, i. e. fraudulent intent need not be proved as a fact, but may be derived as an implication of law; and this, we respectfully submit, would create a legal solecism. While we again urge, as we did in our opening brief, that in this case where actual fraud and estoppel *in pais* are the gist of the suit, and the charges of fraud, and the acts constituting the estoppel are such as to involve the solicitor in his own defense, ~~and~~ he thereby becomes disabled to try the case, we as strongly deny the imputation that his undertaking to defend the suit upon the ground that a question of constructive fraud alone was involved, raises no presumption in law or ethics that he was guilty of an actually fraudulent conspiracy in company with his client to injure or destroy the legal rights of the complainants. The fact remains, however, that Gen. Hart and Mr. Wernse are to be substantial beneficiaries of any decree declaring the transaction of December 20,

1906, fraudulent and void, that they are charged as director and officer, respectively, with having been under the control and domination of the defendant, Cutting, in spite of that fact. The negation of the latter fact lies in establishing a defense of equitable estoppel against The Monetary Trust Company. The Court below might and, as we think, should have determined, that, due to the peculiar relationship of the parties, Mr. Cutting's defense should as a matter of legal propriety, in which the Court as such is properly and directly concerned,—have been fortified by the defense of estoppel, as urged by counsel who had been substituted in place of Gen. Hart. This is the question that we earnestly submit should be taken cognizance of by this Court on this appeal.

Passing, however, to the question of the finality of a decree for the purposes of an appeal, the question whether a decree is final and appealable is not determined by the name which the Court below gives it, but it is to be decided by the appellate Court on a consideration of the essence of what is done by the decree.

Potter v. Beal, 50 Fed. 860.

Following the decisions in *Forgay v. Conrad*, *Thompson v. Bradleys*, and *Hill v. Railroad Company*, the federal Courts have several times recognized the feature of "severableness" involved in so-called "interlocutory" or preliminary orders, as justifying appeals therefrom.

In *Potter v. Beal*, *supra*, the plaintiff, a bank president, whose conduct of banking affairs was under examination by the federal authorities, brought a suit against the receiver of the bank of which he was president, to obtain possession of a trunk alleged to contain private papers. The relief sought was (1) possession of the papers; (2) an injunction against the receiver from using the same before a grand jury; and (3) such other relief as might be just. The United States District Attorney having been allowed to intervene, the Court on a preliminary hearing made an order that the trunk be delivered to a Master to be by him opened and the contents distributed, the private papers not material to the Government's investigation, to the complainant's counsel; those belonging to the bank, and not material to the case of the government, to be delivered to the defendant; those deemed important in behalf of the application of the district attorney to be placed apart and abide the further order of the Court. The Court held that those portions of the order directing delivery of the papers to the complainant and receiver, respectively, were final and appealable.

In *Elliot v. Sackett*, 108 U. S. 132, where the bill sought the reformation of a deed by which complainant was made to assume the payments of a mortgage on the property, and a cross bill was filed seeking foreclosure of the mortgage, the Court held that a decree dismissing the bill, and directing foreclosure in default of payment was final, so as to give the complainant a right to appeal.

In *Terry v. Sharon*, 131 U. S. 40, the object of the suit was to procure a decree declaring null an instrument purporting to be a declaration of marriage between complainant and defendant. A final decree was entered by the Court below directing the delivery up and cancellation of the instrument, but the decree was not executed in the lifetime of the complainant, and his executor filed a bill of revivor. The Supreme Court held the order of revivor to be a final decree. Through Mr. Justice Miller, the Court said that upon a bill to revive a wholly unexecuted decree two questions present themselves: First, whether the decree is in such a condition that any further action can be had; and second, whether who asserts the right is entitled to the benefit of the decree, and in this connection the Court said:

“Both of these questions are matters which interest the defendant in the original decree, and in regard to which he must have a right to a hearing before the circuit court; and the order of the circuit court on that subject is so far final, and may so affect the rights of the defendant, that we think he is entitled to an appeal from such an order, if, in other respects, it is one within the jurisdiction of the Supreme Court. \* \* \* *The order which the Court makes in such a case is so essentially decisive and important that we do not doubt that it is appealable.*” (Italics are ours).

In *Trustees v. Greenough*, 105 U. S. 527, a bill was filed by a creditor of a trust fund, consisting of large tracts of land which had been illegally disposed of by the trustees, and the burden of the



litigation was borne by the complainant, whose efforts resulted in the appointment of a receiver, and the recovery of large bodies of land, and the realizing of a large sum of money therefrom, inuring to the benefit of numerous other creditors who shared in the distribution. Complainant then filed a petition for orders for the payment of attorney's fees, costs and other expense. These orders were granted and in respect thereto the Court said:

“They are certainly a final determination of the *particular* matter arising upon the complainant's petition for allowances, and direct the payment out of the fund in the hands of the receiver. *Though incidental to the cause the inquiry was a collateral one, having a distinct and independent character, and received a final decision.* The administration of the fund for the benefit of the bondholders may continue in Court for a long time to come, dividends may be made from time to time in payment of coupons still unsatisfied. The case is a peculiar one, it is true; but, under all the circumstances, we think that the proceedings may be regarded as so far independent as to make the decision substantially a final decree for the purposes of an appeal.” (Italics are ours).

In *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, the decree appealed from was rendered, in railroad foreclosure proceedings, upon an intervening petition claiming certain locomotives. The decree determined the ownership and right of possession of the locomotives, and an appeal was sustained.

To the same effect is the case of Central Trust Company v. Marietta & N. G. R. Co., 48 Fed. 850.

In Chase v. Driver, 92 Fed. 780, complainant was the owner of an equity of redemption in property which had been sold under deeds of trust, and he filed a bill alleging the irregularity of such sales, and praying for a resale, that the purchaser be held a mortgagee in possession, that an account be taken of the amount due on the mortgages and that the surplus proceeds be paid to him. He did not offer to redeem, or question the validity of the mortgage debt. A decree of resale was ordered, and the case referred to a Master. The property was resold and an order made confirming the sale. Subsequently the Master filed his report which was confirmed and an appeal was taken from the order of confirmation. The Court held on this appeal that the former orders of resale and confirmation of sale were final orders which could not be reviewed on an appeal from the order confirming the Master's report.

In Andrews v. National Foundry and Pipe Works, 73 Fed. 516, a creditors' suit had been brought against a corporation and certain of its stockholders, who were also its mortgagees, and a decree was entered which fixed the amounts due both secured and unsecured creditors, and adjudged that certain creditors had been superior to the mortgagees; that the corporate property be sold to satisfy the same; that the individual defendants were holding specified amounts of unpaid stock,

and should pay the specified demands of the unsecured creditors. It was held that this decree was final and appealable as to all these provisions.

In *Rust v. Waterworks*, 70 Fed., 132, the rule as to appeals from final judgments in all the various aspects shown by the foregoing authorities is stated as follows:

“A final decision, which completely determines the rights in the suit in which it is rendered of some of the parties, who are not claimed to be jointly liable with those against whom the suit is retained, *and a final decision which completely determines a collateral matter*, is subject to review in this Court by appeal or writ of error.” (Italics are ours).

Citing *Williams v. Morgan*, 111 U. S. 684.

See also

*Jackson v. Jackson*, 175 Fed. 715;

*Salmon v. Mills*, 66 Fed. 32.

A decree for specific performance, concluding all the rights of the parties, is a final decree, notwithstanding that a conveyance which it directs is to be afterwards presented to the judges for their approval of its form and terms.

See also

*Long v. Maxwell*, 59 Fed. 948;

*Marian Coal Co. v. Peale*, 204 Fed. 163;

*Montgomery Light, etc., Co. v. Montgomery T., etc., Co.*, 219 Fed. 977, 978.

As previously stated, we do not contend in support of this appeal that it is to be governed by

section 129 of the Judicial Code; but on the other hand we do contend strenuously that so far as that part of the decree declaring the contract of sale between the appellant Cutting and the appellee The Monetary Trust Company for the transfer of 1175 shares of stock of the Point Richmond Canal and Land Company, entered into on or about December 20, 1906, *fraudulent* and *void*, and that it *vested* no title in the appellant, but that *said shares remain the property* of The Monetary Trust Company, the same is final, and that the accounting ordered in the next paragraph of the decree is in execution merely of a final judgment, under all of the authorities.

In the case of *City of Eau Claire v. Payson*, 107 Fed. 552, the Court made an order requiring the city to pay a sum to a receiver on account of a disputed claim against it, but made no provision for the return of the money in any case, and this order was held to be appealable though the city's ultimate liability was left for future determination.

“That the order was appealable there should be no serious doubt. To the extent of the payment required, it was essentially a final decree. It was made without jurisdiction over the party affected, compelled the immediate surrender of a large sum of money, and made no provision for its safe-keeping or return in case a return should be found necessary. It was not ordered into the hands of the receiver to be held for future disposition. If that had been intended, the registry of the Court would have been the appropriate depository. There was no necessity for the order except to supply the receiver with money to

be used in the performance of his trust, and that he might so use it seems to have been the purpose of the petition in seeking, and of the Court in entering, the order. If mere custody of the money was intended, it should have been explicitly so stated. The Supreme Court has not placed upon the words 'final decree,' respecting the right of appeal, a strict and technical sense, but has given them a liberal and reasonable construction. *Forgay v. Conrad*, 6 How. 201, 12 L. Ed. 404; 4 Notes U. S. Rep. 628. See also *Potter v. Beal*, 2 C. C. A. 60, 5 U. S. App. 49, 50 Fed. 860; *Trustees v. Greenough*, 105, U. S. 527, 531, 26 L. Ed. 1157; *Williams v. Morgan*, 111 U. S. 684, 699, 4 Sup. Ct. 638, 28 L. Ed. 559; *In re Farmers' Loan & Trust Co.*, 129 U. S. 206, 9 Sup. Ct. 265, 32 L. Ed. 656; *Stovall v. Banks*, 10 Wall. 583, 19 L. Ed. 1036."

Many of the authorities, notably *Forgay v. Conrad*, *Potter v. Beale* and *Trustees v. Greenough*, recognize the necessity under which the appellate Court is placed to open the record in order to determine fully the facts which are decisive of the question as whether or not it will promote justice and a speedy determination of issues which have been fully and fairly litigated between the parties, to entertain an appeal in advance of a complete determination of all the issues, and in no case which we have been able to find has the Court refused to entertain an appeal, except where the cause is reserved to a Master judicially to pass upon some undetermined matter *relating to the single issue made by the pleadings* from the decision of which it is sought to prosecute the appeal. *We earnestly request the Court to determine if our statement in*



*this particular is not correct.* Certainly the case of Craighead v. Wilson relied upon by counsel presented the single issue of a right to a general accounting.

In the case at bar, the complaint is double. Two issues are presented by the pleadings which are *single* and *severable*, they are, first the issue as to the title to the 1175 shares of the stock of the Point Richmond Canal & Land Company; and second, the issue as to the right of The Monetary Trust Company to a general accounting from the defendant, Cutting, as its officer and agent. The accounting directed to the issues and profits of the stock is merely in execution of the final decree declaring *the title to and property in the stock to be in The Monetary Trust Company*, and confers only a ministerial duty upon the Master; the general accounting ordered places a judicial duty upon the Master but since a decree made upon a Master's report is appealable *in either case*, it works no hardship upon the appellees here to defend an appeal in this Court from that part of the decree which is unquestionably final.

Counsel in his brief and in the oral argument complained that our statement of facts and argument was confusing because it commingled the law and the facts arising upon these two issues. This is not a fair comment, because we dealt with the *facts* relating to complainants' demand for a general accounting only for the purpose of negating the charge of actual fraud, i. e., fraudulent intent,

on the part of Mr. Cutting, in connection with the purchase of 1175 shares of stock, by a reference to matters embraced in the other separate, single and distinct issue in the double pleading. It was their constant endeavor below to support the weakness of their case upon the issue of the ownership of the stock, by imputations of fraud entitling them to a general accounting as to other matters, and we have simply met their attack upon the validity of the transaction of December 20, 1906, by opening up fully to this Court every fact in the whole case, upon which fraud or the imputation of fraud on the part of Mr. Cutting, Mr. Wernse or General Hart could be predicated; and we do not think it lies in the mouth of counsel for the complainants below to complain to this Court of our action in the premises.

We feel that we must have convinced the Court of our earnestness to have the Court open the record on this appeal. We are, to say the least, surprised that counsel should insist upon the dismissal of this appeal. Knowing as they must know the grave concern which the prolongation of this litigation must create for those already interested in the affairs of the Point Richmond Canal & Land Company, and for the interests of their own clients, if they should prevail, we feel justified in characterizing any dilatory proceedings, either in this Court or in the Court below, as merciless to a degree. The record shows the bonds of the Land Company to be overdue. The properties of the company involve an immense harbor and townsite

project at Point Richmond, California; a part of the land has been subdivided and has passed into other ownerships. All of Mr. Cutting's efforts to further finance the affairs of the Land Company in the interests of its stockholders and of third persons to whom it has made sales of lots, are necessarily greatly handicapped by a dispute as to the ownership of so large an amount of its stock as one-fourth of its entire issue.

What may be the motive of complainants below in desiring to delay a decision upon issues so vital to their own concern it is not within our view to discern; but, with great deference, we may urge that we are concerned that there should be no miscarriage of justice growing out of a failure of this Court to understand what an early determination of this *severable controversy* means to the appellant, to the Point Richmond Canal & Land Company, and to those of the public who have bought lots in the Point Richmond Canal & Land Company's sub-division upon the faith and credit that the development of its project shall not be seriously interrupted by disputes between the stockholders of the company and that where such dispute arises, its settlement will not be interminably delayed merely through the whim and caprice of the plaintiff litigants.

We are made bold to urge these considerations upon the Court by the uniform practice of Federal Courts in indulging in the most liberal construction of statutes and a free and unrestrained appli-

cation of the rules of law and equity to meet the demands of justice in particular cases. In this connection we wish to call the Court's attention to Rule 26, Equity Rules, relating to joinder of causes of action. It is as follows:

“The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there is more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such cause of action cannot be conveniently disposed of together, the court may order separate trials.”

It is not necessary to determine whether the complaint in this action under former rules touching multifariousness, would have been bad upon demurrer. But the former practice of federal Courts may be briefly referred to as explaining the spirit of a broader liberality in regard to when litigants may be entitled to separate records upon a joinder of equitable causes of action.

It has long been the rule that whether a bill is demurrable on the ground of multifariousness or misjoinder of causes of action will depend on the special circumstances, *and what the due administration of justice* requires in each case.

Sheldon v. Keokuk Northern Packet Line Co., 8 Fed. 769.

The rule has been stated conversely, "that a bill which involves the same indivisible subject matter is not multifarious because of separate claims thereto."

Rumbarger v. Yokum, 174 Fed. 55.

A bill, under the former practice, was subject to demurrer for multifariousness, if one of the two complainants had no standing in court, or where they set up antagonistic causes of action, *or the relief for which they respectively prayed in regard to a portion sought to be reached involved totally distinct questions, requiring DIFFERENT EVIDENCE AND LEADING TO DIFFERENT DECREES* (syllabus in Walker v. Powers, 104 U. S., p. 245). The Court says in this case (page 251):

"By multifariousness 'is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill,' Story, Eq. Pl. sec. 271. In Daniell's Chancery Practice, 335, it is said in explanation of this that '*it may be that the plaintiffs and defendants are parties to the whole of the transactions which form the subject of the suit, and, nevertheless, those transactions may be so dissimilar that the Court will not allow them to be joined together, but will require distinct records*.' " (Italics are ours.)

The test of multifariousness in a bill containing two different causes of suit against the same person must show two things to concur; first, the grounds



of the suit must be different; second, each ground must be sufficient, as stated, to sustain a bill.

*Brown v. Guarantee Trust Co.*, 128 U. S. 403.

A close analysis of the bill in this case will show that in order to sustain that portion of the decree which we claim is final and from which an appeal lies, complainants had to plead and prove a distinct, severable and different cause of equitable suit to determine the title to a particular subject matter, to-wit: 1175 shares of Land Company stock, with reference to the conduct of defendant in connection with a particular transaction which took place on or about the 20th day of December, 1906. The decree declaring the title, and directing an accounting in execution thereof established the complainants' complete right to the peculiar relief appropriate in such cases. The Court will readily see that no relief for a general accounting could be granted in such a case.

The second and separate cause of suit for relief by way of a general accounting grows out of distinct rights of the complainants relating to distinct transactions occurring at different times and based upon different and distinct obligations due from the defendant Cutting to The Monetary Trust Company, i. e., payment of his stock subscription, the failure to complete a contract between himself personally and the Point Richmond Canal and Land Company, in which it was claimed The Monetary Trust Company had a beneficial interest; and his

misapplication, as an officer and director, of the funds of the Trust Company.

It seems to us very clear that the object of joining these distinct causes of suit was for the purpose of confusing the Court upon the trial in reference to the issue of fraudulent intent necessary to be proved in connection with the transaction of December 20, 1906. At any rate, counsel for the appellees, the Woodwards, have had no hesitancy to use their pleading of these remote facts to supply the total absence of proof of actual fraud on the part of Mr. Cutting in connection with the former transaction. It is this action on the part of complainants, with its resultant unfair and inequitable effects not only upon Mr. Cutting as the owner of all the issued capital stock of the Land Company, if his purchase was valid, or of three-quarters thereof, if it was fraudulent, but also upon the mortgagee of the Land Company's property, the purchasers of lots from it, and upon those who bought in the faith of the development of the town-site and harbor project at Point Richmond, that is forcing the issue of a speedy trial of this appeal on the merits of this single and severable cause of suit. Had the objection of multifariousness been sustained by the trial Court, or if not sustained, separate trials had been ordered pursuant to Rule 26, Equity Rules, no question would now be before the Court as to the finality of the decree upon the issue of the title to the 1175 shares of stock (see motion to dismiss, Trans. pp. 24-29). Must the appellant now lose the benefit which would have

accrued to him by having two records, when he has sought throughout to avoid the very condition which counsel for the appellees now argue should operate against a recognition of this part of the decree as final and appealable?

Our answer is that under Rule 26, as we construe it, whenever the demands of justice require it, a bill in equity may be so framed, as to require a separate trial of separate issues, when under the former practice it would be bad for multifariousness. Under the provision that "If any such cause(s) of action cannot be conveniently disposed of together the Court may order separate trials," the objection of multifariousness largely disappears. This rule manifestly contemplates the action that may be had in the trial court; but is not the analogy striking when we address ourselves to the application of the same principle and ask a separate trial of this appeal upon the single and severable issue found by the final decree adjudging the title of the 1175 shares of stock to be in The Monetary Trust Company? The rule determining whether or not a bill is multifarious has always been applied with reference to whether or not the joinder of several equitable causes of suit rendered the issue too complex, or resulted in such a confusion as to render the trial of them difficult, inconvenient, or unjust to any of the parties. The more liberal spirit of modern equity practice is to advance the issues to a speedy determination, even if separate trials are necessary. A principle so salutary in its operations, so direct in its response to the demand

for a convenient and speedy administration of justice, should, we respectfully submit, find an appropriate application in appellate procedure.

Counsel for the appellees state that there is no appeal from an order denying a petition for a re-hearing; but that is entirely different from the question as it is presented here. The Court will not only review such an order on an appeal from a final decree but will, in the interest of justice on its own motion *reverse the decree*, and remand the case for a re-hearing with directions to permit the taking of further evidence, where the record fails to show facts essential to a proper decision of the case.

Barbour v. Coit, 118 Fed. 272;

Standard Computing Scale Co. v. Computing Scale Co., 145 Fed. 627;

Esto v. Lear, 7 Pet., 130, 131;

Ill. Cent. R. Co. v. Illinois, 146 U. S. 387.

Counsel urge in their brief that the question of estoppel cannot be considered in this appeal, because it is not pleaded in the answer of the defendant Cutting. They also make a point that the answer is a joint and several answer of Mr. Cutting and The Monetary Trust Company, in behalf of proof of the conspiracy of Cutting, Wernse and General Hart to defraud the plaintiffs. Our petition for a re-hearing states as one of its grounds that estoppel against The Monetary Trust Company should have been pleaded, and that the plaintiff was not advised by his then counsel of this defense.

We have asserted repeatedly that it would not be within the right expectation of a judicial mind to assume that this defense would readily occur to General Hart since it would rest upon a consideration of his own conduct as a stockholder and general counsel of the Trust Company since December 20, 1906, and that his failure to make such defense is not to be taken as evidence either of actual fraud on the one hand, or of lack of proper zeal for his client on the other. The whole transaction merely involves one of those unescapable conditions which it is the office of judicial minds and the proper function of Courts to unravel and straighten out in justice to all the parties concerned. We, therefore, again strongly urge the propriety on the part of this Court of taking cognizance of this appeal, if for no other purpose than to determine the questions arising upon the petition for a re-hearing. We have made a diligent search for authorities which would sustain our request upon this particular ground, and are unable to find any; and we must assume that the question is raised for the first time, and we must be content to rest the matter upon broad principles of public policy which have for their object the prompt determination of litigation.

In conclusion it is necessary for us to refer to certain inferences of fraud which the Court is asked to draw from the record as touching the merits of the case.

If it is admitted that a stockholders' suit can not be maintained to set aside a transaction that



is merely constructively fraudulent, then the actual fraud, i. e., the fraudulent intent on the part of the party charged therewith, must synchronize with the transaction complained of, and proof thereof must be clearly and positively made; and, furthermore, it cannot be proved by evidence of fraudulent conduct alleged to have taken place at other times.

United States v. Budd, 144 U. S. 164.

Now, if the Court please, what does all the argument of counsel for the appellees, the Woodwards, about the note of Mr. Cutting being outlawed mean if it is not an attempt to supply the utter lack of proof of actual fraud on the part of Mr. Cutting in the transaction of December 20, 1906? Mr. Cutting gave his check for the stock on that day. It was carried into the books of the company of February 28, 1907, as a cash item (the date when he had issued to him as shown by the stock certificate stub of the Point Richmond Canal & Land Company, all of the issued stock of that company, except qualifying shares to directors, including his own 2350 shares, the 1175 shares of stock bought from Reichert, the 150 shares from Lewis and the 1175 shares from The Monetary Trust Company and some small lots from other sources, making up a certificate for something in excess of 4900 shares), and it was held as a cash item until some time in June, when Mr. Cutting issued his note and took up the check.

Mayo, a director of the company, knew on December 21, 1906, of the intention of The Monetary Trust Company to loan this money back to Cutting. It

is conceded that Wernse, Morgan and Betz, the other directors, who with Cutting, constituted the Board of Directors of the Trust Company, knew of this intention at the same time. Mayo has been a member of the board continuously since the note was given, yet in spite of this, the contention seems to be seriously urged that Mr. Cutting has secretly and silently plotted during four years since the note was made to secure a position whereby he could plead the statute of limitations against this obligation and thus defraud these interests, all represented in the Board of Directors and owning two-thirds of the entire issued capital stock of the Trust Company. And in support of this claim there is not a breath of proof that Mr. Cutting has ever exercised any coercion, adverse pressure, or undue influence over any member of the board, and the only testimony touching the point that the interest of the Woodward, represented by Mayo on the board, did not receive proper consideration, is the testimony of Mayo as follows:

“I had absolutely nothing to do with the management of the Monetary Trust Company at the time; I merely attended the meetings to protect the interests of myself and my clients. I had nothing to do with the management and cut no figure in anything that was done. I was not allowed in any of the secret councils of the company. It is hard to say what I know about secret councils; they were all in the office there together, and I noticed whenever I would come into his office there would be a hush, nothing said. My presence always caused silence.” (Trans. p. 176).

The Court is seriously asked to consider conduct, which could not be characterized as amounting to more than the giving of "a cold shoulder" to a member of a Board of Directors, if it be true, as proof of *actual fraud*.

The Court must be impressed with the seriousness of the consequences to Mr. Cutting if the decree in this case is affirmed only upon the strength of an implication to be drawn from the *supposition* that he has intended through an interval of four years to eventually evade the payment of an honest debt by the plea of the statute of limitations; and which indeed is a personal privilege that may be waived. On the oral argument we mentioned that in the situation in which he found himself when this suit was brought, it would be a badge of fraud, to attempt even to fortify his claim of good faith in the transaction of December 20, 1906, by taking up this note without there being changed conditions in the affairs of the company requiring it, other than the fact of the bringing of the suit. *There are occasions when honest men cannot afford to act under coercion.* The whole issue in this case revolves around the character of Mr. Cutting for honesty and integrity in his business transactions, and we are anxious to meet that issue fairly and squarely upon the full record in the case. We believe that if the testimony were evenly balanced the court would hesitate to decide against the fairness of the transaction of December 20, 1906, in the face of a reasonable showing that would seem to make it possible for men occupying the position

that Mayo, Wernse and General Hart have occupied toward The Monetary Trust Company from the date of its organization, to benefit by a decree in a case to the substantial extent the record shows that they will here; but where there is no proof of bad faith, or the actual fraudulent intent, necessary to satisfy the demands of the law, as is the case here, we have great confidence that this appeal will be entertained and that appropriate relief will be granted with reference to establishing the ownership of the 1175 shares of Land Company stock in Mr. Cutting.

There is in the custody of the clerk of this Court, three sets of all the documents, papers and exhibits referred to in our briefs as being contained in the record, but not printed in the transcript. We have thought that the originals would be reserved for the use of the judge residing in San Francisco, and that the photographic copies contained in the original statement of evidence filed in the Court below and brought up under an order of that Court, and the same matter in the form of photographic copies in the clerk's transcript filed in this Court could be conveniently sent to the two judges residing elsewhere. All of this matter is important inasmuch as it represents our purpose to manifest to this Court a desire to have it examine the record even more fully than it was presented by counsel in the court below. The minute book, books of account, stock certificate books from which we derive the larger part of our evidence of good faith and fair dealing on the part of Mr. Cutting, was introduced in evidence *en masse* in the Court

below and the particular points made here and in our opening brief, as being supported by evidence drawn from these quarters, were not called to the attention of the trial Court by the then counsel for Mr. Cutting.

Dated, San Francisco,  
April 3, 1916.

Respectfully submitted,

JACOB M. BLAKE,  
*Solicitor for Appellant.*



No. 2733

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

HENRY C. CUTTING,

*Appellant,*

VS.

HENRY J. WOODWARD, FRANCIS A. WOOD-  
WARD and THE MONETARY TRUST COMPANY  
(a corporation),

*Appellees.*

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## APPELLANT'S SUPPLEMENTAL AUTHORITIES in Opposition to Appellees' Motion to Dismiss.

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JACOB M. BLAKE,  
*Solicitor for Appellant.*

---

*Filed this.....day of May, 1916.*

FRANK D. MONCKTON, *Clerk.*

*By.....Deputy Clerk.*



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A further authority in support of the finality of that portion of the decree appealed from, declaring the title to 1175 shares of stock of the Land Company to be in the appellee Trust Company is the case of the *Detroit & M. R. Co. v. Michigan Railroad Commission*, decided by the United States Supreme Court April 3, 1916, and reported in the United States Supreme Court Advance Opinions, 1915, May 1, 1916, No. 11, p. 427, and which went up on writ of error to Supreme Court of Michigan to review a judgment awarding a writ of mandamus to enforce obedience by a railroad company to an

order of the Railroad Commission, directing it to relay rails removed by it from a logging spar, and to resume service thereon.

The facts show that following the making of this order by the Railroad Commission, the railroad company filed a bill in equity in the state circuit court of Wayne County praying that the order be vacated and its enforcement be temporarily and permanently enjoined. During the pendency of the suit in the state court the mandamus suit was commenced and carried to judgment in the Supreme Court by the Railroad Commission. The answer of the railroad company denied that it had had an adequate opportunity to be heard, and that to require it to give effect to the Commission's order in advance of a hearing and decision upon that question in the suit in equity would deprive it of due process of law.

Upon the motion to dismiss the Court says:

“Our jurisdiction is called in question upon the ground that the judgment is not final in the sense of Sec. 237, Judicial Code (36 Stat. at L. 1156, Chap. 231, Comp. Stat. 1913, Sec. 1214), upon which our power to review depends, because the judgment does not determine the merits and end the litigation. But, as this Court has said, ‘all judgments and decrees which determine the particular cause’ are final in the sense of the statute. *Weston v. Charleston*, 2 Pet. 449, 463-465; 7 L. ed. 481, 486, 487; *Cent. Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24, 40; 35 L. ed 55, 61; 11 Sup. Ct. Rep. 478; *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabam Interstate Power Company*, 240

U. S. 30, ante 234, 36 Sup. Ct. Rep. 234. This view has prevailed through a century of practice in reviewing judgments and decrees for want of jurisdiction or for other reasons not decisive of the merits."

We desire to call especial attention to the use by the Court of the words "particular cause" as applying to the particular cause of suit involved on this appeal, the decree as to which we claim to be final. At page 17 of our main answer brief to the motion to dismiss, we earnestly request the Court to determine if there be any case where a Federal Court has refused to entertain an appeal in advance of a full determination of all the issues, except where the cause was reserved to a master judicially to pass upon some undetermined matter relating to *the single issue from the decision of which it was sought to prosecute the appeal*. We neglected then to point out that both the cases of *McGourky v. Toledo and Ohio Central Railway Company*, 146 U. S. 546, and *California National Bank v. Stateler*, 171 U. S. 449, relied upon by the appellees, and where it was held that the decrees were not final, involved but a single issue in each case, and the decrees, adjudging the title to the property in the one case and to the fund in the other, involved a reference and further hearing of the cause upon *those issues for the purpose of determining judicially the further rights of the respective parties in relation thereto*.

In *Craighead v. Wilson*, 18 How. 201, relied upon by the appellees, the Court says:



“In no legal sense of the term is the decree now before us a final one. The basis of the decree, embracing the equities in the bill, is found, but the distribution among the parties in interest depends upon the facts to be reported by the master. It is his duty, under the interlocutory decree, to balance the equities, by ascertaining what has been expended on the property, and what has been received by each of the claimants; and also every other matter which should have a bearing and influence in the distribution of the property. Until the court shall have acted upon this report and sanctioned it, giving to each of the devisees his share of the estate under the will, the decree is not final.”

But such is not the case with reference to that part of the decree appealed from here and which determines the title *absolutely* to the 1175 shares of stock as well as to “the income, profits, dividends, or benefits” derived therefrom.

We respectfully submit that in view of the added authorities here submitted and the absence of any authority refusing to recognize as final a decree finally adjudging the full rights of all of the parties to property which is the subject matter of a separate and distinct cause of suit, such a decree is one which determines “the particular cause,” and is, therefore, final and appealable.

Dated, San Francisco,  
May 10, 1916.

Respectfully submitted,  
JACOB M. BLAKE,  
*Solicitor for Appellant.*

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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GIDEON M. FREEMAN,  
Plaintiff in Error,  
vs.  
THE UNITED STATES OF AMERICA,  
Defendant in Error.

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Transcript of Record.

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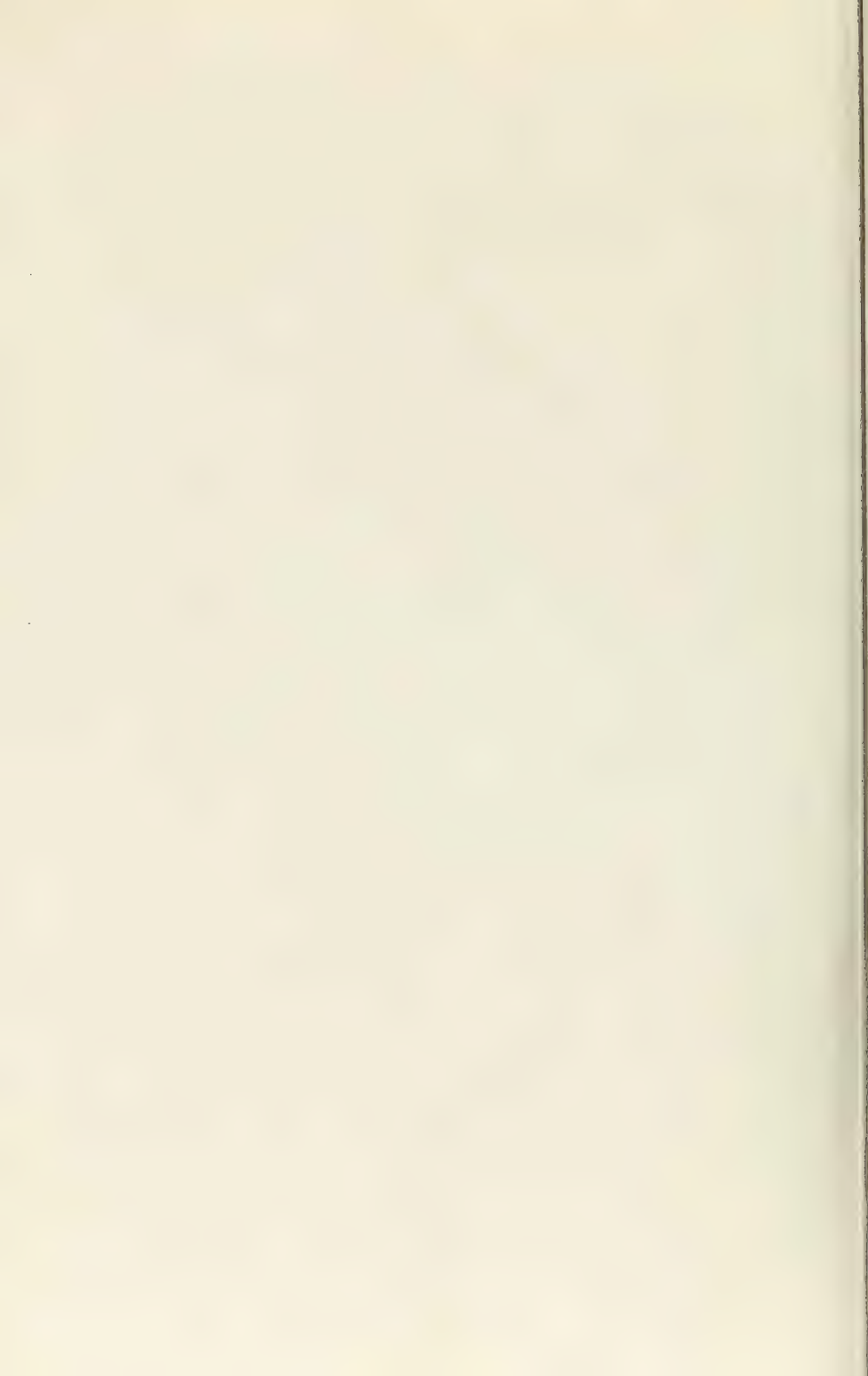
Upon Writ of Error to the United States District Court of the  
Northern District of California, First Division.

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Filed

DEC 27 1916

F. D. Monckton,  
Clerk.



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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GIDEON M. FREEMAN,

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vs.

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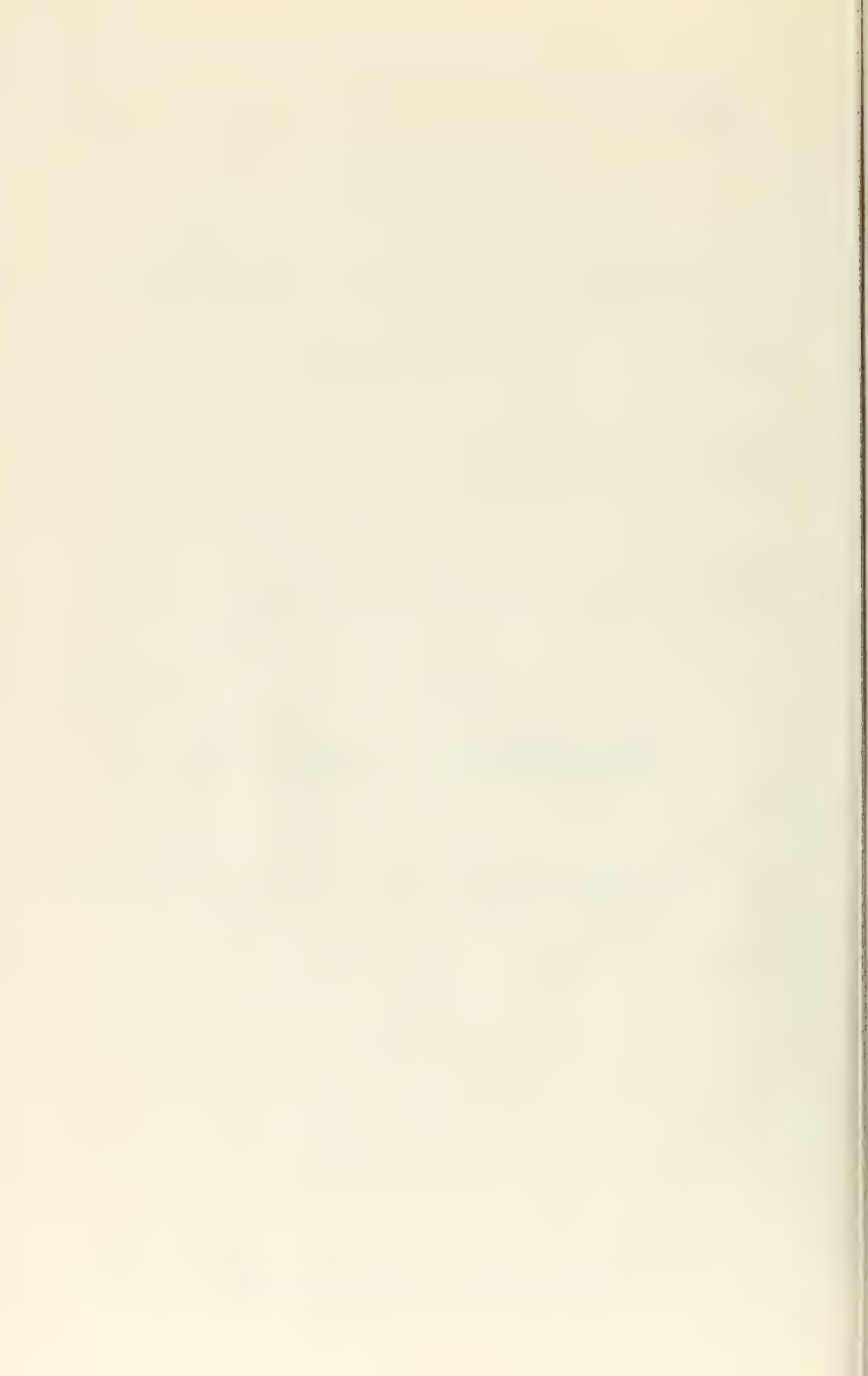
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Upon Writ of Error to the United States District Court of the  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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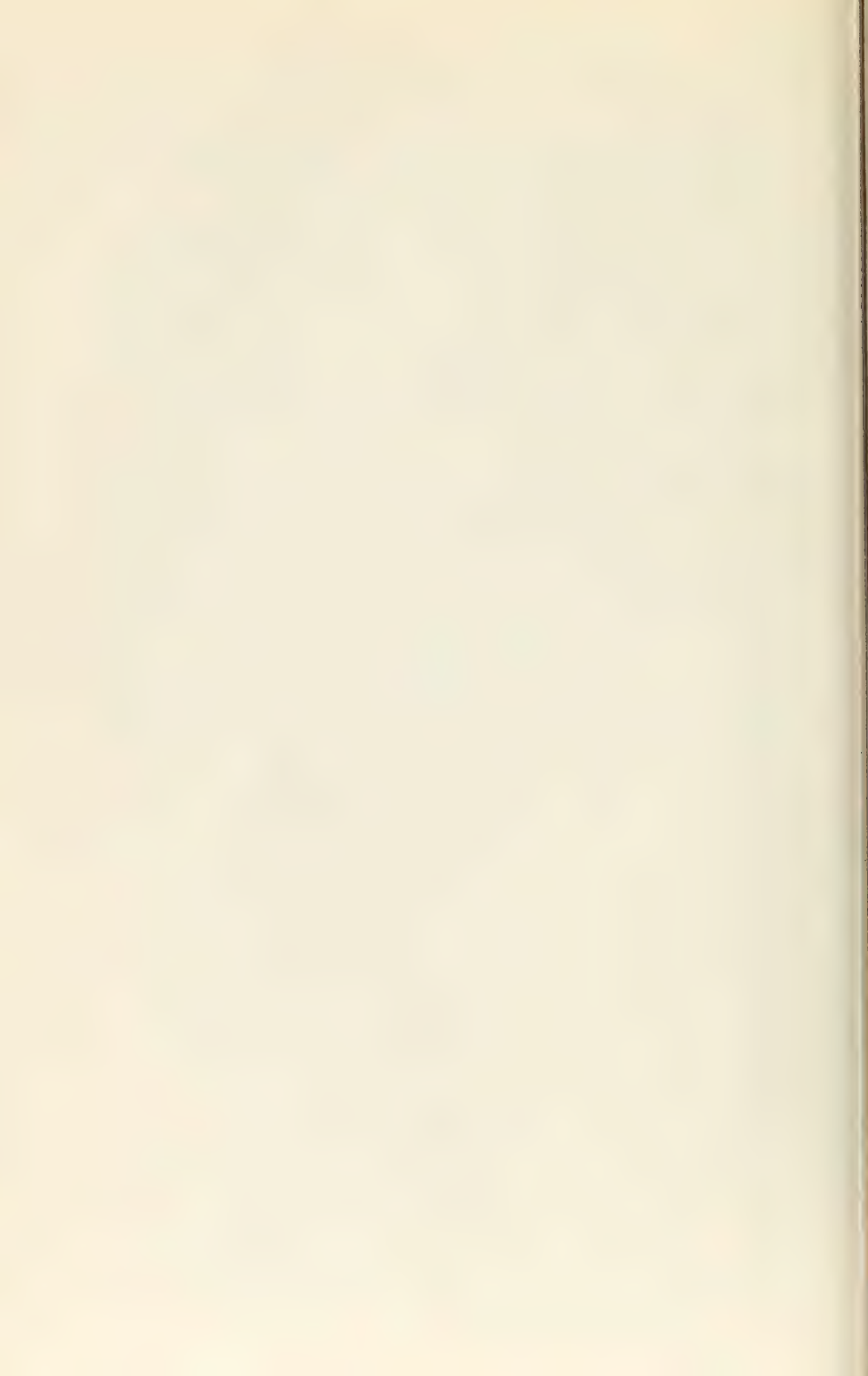
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**Names and Addresses of Attorneys of Record.**

CHARLES H. FAIRALL, Esq., KNIGHT & HEG-  
GERTY,

Attorneys for Defendant and Plaintiff in  
Error.

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**UNITED STATES OF AMERICA.**

*District Court of the United States, Northern Dis-  
trict of California.*

Clerk's Office.

No. 5686.

DR. GIDEON M. FREEMAN,

Plff. in Error,

vs.

THE UNITED STATES OF AMERICA,

Deft. in Error.

**Praeipie for Transcript of Record.**

To the Clerk of Said Court:

Sir: Please prepare copies of following papers  
and certify to same to be filed with the Clerk of the  
U. S. Circuit Court of Appeals, Ninth Circuit, to  
compose transcript on appeal:

Judgment-roll.

Bill of Exceptions.

Bond on Appeal.

Bond for Costs.

Order Allowing Writ of Error.

Assignment of Errors.

Petition for Writ of Error.

Order Enlarging Time.

This Praeceptum .

KNIGHT & HEGGERTY,  
Attorneys for Plff. in Error.

[Endorsed]: Filed Nov. 19, 1915. W .B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [1\*]

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(INDICTMENT.)

Violation Sec. 215, C. C. U. S.

*In the District Court of the United States, in and for  
the Northern District of California, First Division.*

At a stated term of said court, begun and holden at the City and County of San Francisco, within and for the State and Northern District of California, on the first Monday of March, in the year of our Lord one thousand nine hundred and fifteen.

The Grand Jurors of the United States of America, within and for the State and District aforesaid, on their oaths present: THAT

DR. GIDEON M. FREEMAN, *alias* PAUL ALLEN, doing business at No. 986 Market Street, in the City and County of San Francisco, in the State and Northern District of California, under the name of Dr. Jordan, L. J. Jordan Co. and Jordan's Museum of Anatomy, a corporation, organized and existing under and by virtue of the laws of the State of California, late of the said State and District, here-

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\*Page-number appearing at foot of page of original certified Transcript of Record.



tofore, to wit, on or about the 15th day of May, in the year of our Lord one thousand nine hundred and twelve, in the City and County of San Francisco, State and Northern District of California, within the jurisdiction of this Court, and under the guise and name of the said Jordan's Museum of Anatomy, devised a certain scheme or artifice to defraud, or for obtaining money or property by means of certain false pretenses, representations or promise to be effected by means of the postoffice establishment of the United States, which said scheme or artifice is in substance and effect as follows:

That he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, should place or cause to be placed, advertisements in certain newspapers of general circulation published within the [2] United States, or in letters, booklets or other prints, wherein it should be set forth in substance or effect that the said Dr. Jordan was a physician practicing in the City and County of San Francisco, State of California, and specifically qualified to treat private diseases of men, that is to say, among other diseases, syphilis (blood poison), gonorrhea, and diseases and affections arising therefrom, lost vitality, bladder, kidney, prostatic and urinary diseases, and had cured numerous persons afflicted with said diseases, and by means of said advertisements, letters, booklets or other prints, he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, then and there intended to cause or induce John Bammer, J. P. Millspaugh, George R. Alberts, Anson Ashford, and John Caroway, and divers other persons whose names are to the Grand

Jurors aforesaid, unknown, and the public generally, to communicate and open correspondence with Dr. Jordan, by means of the postoffice establishment of the United States relative to their real or supposed ailments; that when said persons should communicate with him, the said Dr. Jordan, whom he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, then and there well knew was not a doctor or person existing in life or in fact during all of the times set forth in this indictment, by the means aforesaid, that the said Dr. Jordan should write or communicate with said persons by means of letters placed in the said postoffice establishment of the United States, and in substance and effect should state to each of such persons, with intent to defraud each and all of said persons, irrespective of the symptoms theretofore communicated as aforesaid to him, and even in cases where the symptoms indicated health rather than disease, and without any proper knowledge of the real condition of said persons, that they, the said persons, were afflicted with diseases which he, the [3] said Dr. Jordan, could cure, and that he would furnish treatments for the cure of such alleged diseases upon the payment to him of certain sums of money; and that by means of said letters so placed as aforesaid, by the said Dr. Gideon M. Freeman, *alias* Paul Allen, he, then and there intended to cause or induce all of said persons so communicating with the said Dr. Jordan as aforesaid, to deliver or send to the address of Dr. Jordan, sums of money for the purpose of procuring from him (as said persons had been led to believe),

medicine or treatments skillfully or properly designed or prepared for the cure or alleviation of the diseases with which said persons were afflicted, or had been so induced by said Dr. Gideon M. Freeman, *alias* Paul Allen, to believe themselves to be afflicted, which said sums of money, so sent or delivered to the said Dr. Jordan as aforesaid, he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, should fraudulently convert or appropriate to his own use, and in return therefor, should send or deliver to each of said persons so sending or delivering to him sums of money, certain medicine or treatment not skillfully or properly designed or prepared, and of little or no value, for the cure of the aforesaid persons, Dr. Gideon M. Freeman, *alias* Paul Allen, then and there having no proper or professional knowledge of such persons' conditions, or whether such persons were diseased or not, or whether or not said purported medicine or treatment was capable of benefitting said persons, as he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, then and there well knew.

And he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, on the second day of July, in the year of our Lord one thousand nine hundred and twelve, at the City and County of San Francisco, in the State and Northern District of California, for the purpose [4] of executing said scheme and artifice or in attempting so to do, unlawfully, feloniously, knowingly and willfully, did place or cause to be placed in the postoffice establishment of the United States at San Francisco, in the State and

District aforesaid, or in a station, street box or letter-box thereof, an authorized depository for mail matter, to be sent or delivered by the postoffice establishment of the United States, a certain letter upon which the postage had been fully prepaid, and addressed to John Bammer, Colusa, Calif., a copy of said letter being as follows, to wit:

"Office of  
Dr. L. J. Jordan,  
986 Market St.  
Opposite Sixth  
Hours: 9 A. M. to 5 P. M.  
and 7 to 9 P. M.  
Sundays, 10 to 12 A. M.

Private Address:  
Paul Allen,  
986 Market Street.

Jordan's Museum of  
Anatomy.  
Established 50 years,  
Diseases of Men.

San Francisco, Cal., July 2, 1912.

Mr. John Bammer,

Box 800, Colusa, Cal.

Dear Sir and Friend:—

I have your return of the question blank and test papers. You should have written me by letter also—giving me any further information you deem necessary that I should know. From the data you sent me it is my judgment that you have an excess of amorphous urates and phosphates, indicating wasted energy, and anemia neuresthenia, at the expense of some of the functions of the body. You require and demand treatment to place you on a par with your fellow men. You will find the testicles are weak and flabby and not manufacturing healthy spermatozoa. There is no evidence of Bright's Disease, or proof of Diabetes, altho an overworked kidney may lead to both. You will find mucuous stings flocculi or sediment in the urine indicating prostatic inflammation at the neck of the bladder, with the consequent loss of vitality and absence of



complete sexual satisfaction required by all male animals of health.

Your case is a complicated one requiring careful and scientific treatment on the part of any physician who treats you. If you give your case into my hands I must have honest co-operation on your part, following to the letter my instructions, which are perfectly simple.

I don't profess to say that your case is an easy one to handle. But you can secure very material assistance. My treatment will create new blood, new muscle and new secretions, promote circulation, build up and maintain new nerve cells and fibres. The old tissue will be removed and new substituted in it's place. The weakened and run down system will be built up and invigorated, and injected with spirit and life—such as should be found in every man who cares to give the proper attention to his health and the maintenance of his vigor and manhood power.

I will take your case and furnish the medicine required for \$10.00 a month. This is fair method of payment to you, although [5] I do not know your financial circumstances. You need not hesitate to write me fully as everything is kept confidential. All medicines are sent out in plain packages, and no one knows from whom they come.

I would like your reply by return mail whether you wish to take up the treatment or not. By writing me your intentions, I will know what to do about further correspondence. I do not like to write unnecessary letters to any one, as they might go



astray, or fall into some else's hands and cause you embarrassment; therefore, reply at once.

If you could come down and see me—I would be glad to have you do so. Please let me know if you can come, and at what time. I would like to talk with you, as things can be explained better by a personal interview than in a letter.

With kind regards, and best wishes, and awaiting your early reply, I remain,

Very Sincerely yours,

Dr. L. J. JORDAN.

Dict. X.”

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

#### SECOND COUNT.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: THAT

DR. GIDEON M. FREEMEN alias PAUL ALLEN, doing business at No. 986 Market Street, in the City and County of San Francisco, in the State and Northern District of California, under the name of Dr. Jordan, L. J. Jordan Co. and Jordan's Museum of Anatomy, a corporation organized and existing under and by virtue of the laws of the State of California, late of the said State and District, heretofore, to wit, on or about the fifteenth day of May in the year of our Lord, one thousand nine hundred and twelve, in the City and County of San Francisco, State and Northern District of California, within the jurisdiction of this Court, and under the

guise and name of the said Jordan's Museum of Anatomy, devised a certain scheme or artifice to defraud, or for obtaining money or property by means of certain false pretenses, representations, or promises to be effected by means of the post-office [6] establishment of the United States, which said scheme or artifice is in substance and effect as follows:

That he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, should place or cause to be placed, advertisements in certain newspapers of general circulation published within the United States, or in letters, booklets, or other prints, wherein it should be set forth in substance or effect that the said Dr. Jordan was a physician practicing in the City and County of San Francisco, State of California, and specifically qualified to treat private, diseases of men, that is to say, among other diseases, syphilis (blood poison), gonorrhea, and diseases and affections arising therefrom, lost vitality, bladder, kidney, prostatic and urinary diseases, and had cured numerous persons afflicted with said diseases, and by means of said advertisements, letters, booklets or other prints, he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, then and there intended to cause or induce John Bammer, J. P. Millspaugh, George R. Alberts, Anson Ashford, and John Caroway, and divers other persons whose names are to the Grand Jurors aforesaid, unknown, and the public generally, to communicate and open correspondence with Dr. Jordan, by means of the postoffice establishment of the United States rela-

tive to their real or supposed ailments; that when said persons should communicate with him, the said Dr. Jordan, whom he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, then and there well knew was not a doctor or person existing in life or in fact during all of the times set forth in this indictment, by the means aforesaid, that the said Dr. Jordan should write or communicate with said persons by means of letters placed in the said post-office establishment of the United States, and in substance and effect should state to each of such persons, with intent to defraud each and all of said persons, irrespective of [7] the symptoms theretofore communicated as aforesaid to him, and even in cases where the symptoms indicated health rather than disease, and without any proper knowledge of the real condition of said persons, that they, the said persons, were afflicted with diseases which he, the said Dr. Jordan, could cure and that he would furnish treatments for the cure of such alleged diseases upon the payment to him of certain sums of money; and that by means of said letters so placed as aforesaid, by the said Dr. Gideon M. Freeman, *alias* Paul Allen, be then and there intended to cause or induce all of said persons so communicating with the said Dr. Jordan as aforesaid, to deliver or send to the address of Dr. Jordan, sums of money for the purpose of procuring from him (as said persons had been led to believe), medicine or treatments skilfully or properly designed or prepared for the cure or alleviation of the diseases with which said persons were afflicted,

or had been so induced by said Dr. Gideon M. Freeman, *alias* Paul Allen, to believe themselves to be afflicted, which said sums of money, so sent or delivered to the said Dr. Jordan as aforesaid, he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, should fraudulently convert or appropriate to his own use, and in return therefor, should send or deliver to each of said persons so sending or delivering to him sums of money, certain medicine or treatment not skilfully or properly designed or prepared, and of little or no value, for the cure of the aforesaid persons, Dr. Gideon M. Freeman, *alias* Paul Allen, then and there having no proper or professional knowledge of such persons' conditions, or whether such persons were diseased or not, or whether or not said purported medicine or treatment was capable of benefiting said persons, as he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, then and there well knew. [8]

And he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, on the twenty-fifth day of February in the year of our Lord, one thousand nine hundred and thirteen, at the City and County of San Francisco, in the State and Northern District of California, for the purpose of executing said scheme and artifice, or in attempting so to do, unlawfully, feloniously, knowingly and wilfully, did place or cause to be placed in the postoffice establishment of the United States at San Francisco, in the State and District aforesaid, or in a station, street box or letter-box thereof, an authorized depository for mail matter, to be sent or delivered by the post-



office establishment of the United States, a certain letter upon which the postage had been fully prepaid, and addressed to J. P. Millspaugh, Cherry Creek, Nevada, a copy of which said letter being as follows, to wit:

"Office of  
Dr. L. J. Jordan,  
986 Market St.  
Opposite Sixth  
Hours: 9 A. M. to 5 P. M.  
and 7 to 9 P. M.  
Sundays, 10 to 12 A. M.

Private Address:  
Paul Allen,  
986 Market Street.

Jordan's Museum of  
Anatomy.  
Established 50 years,  
Diseases of Men.

San Francisco, Cal. Feb. 25, 1913.

Mr. J. P. Millspaugh,  
Cherry Creek, Nevada.

Dear Sir:—

This is in reply to yours of recent date. The chemical test papers and question blank were carefully and scientifically considered. From this data it is my judgment that you have an excess of amorphous urates and phosphates, indicating wasted energy, anemia neuresthenia at the expense of some of the functions of the body. You require and demand treatment to place you on par with your fellow men.

You will find the testicles are weak and flabby and are not manufacturing healthy spermatozoa. There is no evidence of BRIGHT'S DISEASE or proof of DIABETES, although an overworked kidney may lead to both. You will find mucuous strings flocculi or sediment in the urine indicating prostatic inflammation at the neck of the bladder, with the consequent loss of vitality and absence of complete sexual satisfaction absolutely required by all male animals of health.



Your case is a complicated one requiring careful and scientific treatment on the part of any physician who takes upon himself the responsibility of treating you. If you give your case into my hands I must have honest co-operation on your part, following to the letter my instructions. [9]

I will take your case and furnish all medicines required in the course of treatment for \$47.50 cash, or, if you wish to pay on time \$17.50 down and \$10.00 monthly; time required, about three or four months. If you accept either of these propositions, which are very liberal, kindly remit the amount with which to start in, and continue to do so until cured. Sexual neuresthenia results from the violation of the laws of health so impairing the system that it ceases to perform its functions.

The victim is awakened by dreams, the result of this disturbance; this is continued, usually occurring at shorter intervals often accompanied by erotic dreams, until the organ becomes incapable of performing its functions, producing a long line of reflex irritations and complications.

You cannot afford to lose your stamina or to be a failure in life. Low spirits never bother the healthy. No one can be happy or successful unless well. There is latent power in every one—all it wants is to be awakened and cared for.

Expecting an early reply, I am,

Yours very truly,

Dr. L. J. JORDAN.

Diet. by F. L.”

AGAINST the peace and dignity of the United States of America, and contrary to the form of the

statute of the said United States of America in such case made and provided.

### THIRD COUNT.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: THAT

Dr. GIDEON M. FREEMAN, *alias* PAUL ALLEN, doing business at No. 986 Market Street, in the City and County of San Francisco, in the State and Northern District of California, under the name of Dr. Jordan, L. J. Jordan Co. and Jordan's Museum of Anatomy, a corporation organized and existing under and by virtue of the laws of the State of California, late of the said State and District, heretofore, to wit, on or about the fifteenth day of May in the year of our Lord, one thousand nine hundred and twelve, in the City and County of San Francisco, State and Northern District of California, within the jurisdiction of this Court, and under the guise and name of the said Jordan's Museum of Anatomy, devised a certain scheme or artifice to defraud, or for obtaining money or property by means of certain false pretenses, representations or promises to be effected by means of the [10] postoffice establishment of the United States which said scheme or article is in substance and effect as follows:

That he, the said Dr. Gideon M. Freeman *alias* Paul Allen, should place or cause to be placed, advertisements in certain newspapers of general circulation published within the United States, or in letters, booklets or other prints, wherein it should be set forth in substance or effect that the said Dr.

Jordan was a physician practicing in the City and County of San Francisco, State of California, and specifically qualified to treat private diseases of men, that is to say, among other diseases, syphilis (blood poison), gonorrhea, and diseases and affections arising therefrom, lost vitality, bladder, kidney, prostatic and urinary diseases, and had cured numerous persons afflicted with said diseases, and by means of said advertisements, letters, booklets or other prints, he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, then and there intended to cause or induce John Bammer, J. P. Millspaugh, George R. Alberts, Anson Ashford, and John Caroway, and divers other persons whose names are to the Grand Jurors aforesaid, unknown, and the public generally, to communicate and open correspondence with Dr. Jordan, by means of the postoffice establishment of the United States relative to their real or supposed ailments; that when said persons should communicate with him, the said Dr. Jordan, whom he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, then and there well knew was not a doctor or person existing in life or in fact during all the times set forth in this indictment, by the means aforesaid, that the said Dr. Jordan should write or communicate with said persons by means of letters placed in the said postoffice establishment of the United States, and in substance and effect should state to each of such persons, with intent to defraud each and all of said persons, irrespective [11] of the symptoms theretofore communicated as aforesaid to him, and even in cases where the symptoms indicated health rather

than disease, and without any proper knowledge of the real condition of said persons, that they, the said persons, were afflicted with diseases which he, the said Dr. Jordan, could cure, and that he would furnish treatments for the cure of such alleged diseases upon the payment to him of certain sums of money; and that by means of said letters so placed as aforesaid, by the said Dr. Gideon M. Freeman, *alias* Paul Allen, he then and there intended to cause or induce all of said persons so communicating with the said Dr. Jordan as aforesaid, to deliver or send to the address of Dr. Jordan, sums of money for the purpose of procuring from him (as said persons had been led to believe), medicine or treatments skilfully or properly designed or prepared for the cure or alleviation of the diseases with which said persons were afflicted, or had been so induced by said Dr. Gideon M. Freeman, *alias* Paul Allen, to believe themselves to be afflicted, which said sums of money, so sent or delivered to the said Dr. Jordan as aforesaid, he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, should fraudulently convert or appropriate to his own use, and in return therefor, should send or deliver to each of said persons so sending or delivering to him sums of money, certain medicine or treatment not skilfully or properly designed or prepared, and of little or no value, for the cure of the aforesaid persons, Dr. Gideon M. Freeman, *alias* Paul Allen, then and there having no proper or professional knowledge of such persons' conditions, or whether such persons were diseased or not, or whether or not such purported medicine or treat-



ment was capable of benefitting said persons, as he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, then and there well knew. [12]

And he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, on the fifteenth day of July in the year of our Lord one thousand nine hundred and twelve, at the City and County of San Francisco, in the State and Northern District of California, for the purpose of executing said scheme and artifice, or in attempting so to do, unlawfully, feloniously, knowingly and wilfully did place or cause to be placed in the postoffice establishment of the United States at San Francisco, in the State and District aforesaid, or in a station, street box or letter-box thereof, an authorized depository for mail matter, to be sent or delivered by the postoffice establishment of the United States, a certain letter upon which the postage had been fully prepaid, and addressed to Mr. Geo. R. Alberts, Box 1648, Tombstone, Arizona, a copy of said letter being as follows, to wit:

"Office of  
Dr. L. J. Jordan,  
986 Market St.  
Opposite Sixth  
Hours: 9 A. M. to 5 P. M.  
and 7 to 9 P. M.  
Sundays, 10 to 12 A. M.

Private Address:  
Paul Allen,  
986 Market Street.

Jordan's Museum of  
Anatomy.  
Established 50 years,  
Diseases of Men.

San Francisco, Cal., July 15, 1912.

Mr. Geo. R. Alberts,  
Box 1648,

Tombstone, Arizona.

My Dear Sir:—

I had expected to hear from you ere this. I have written several letters, and I think I am entitled to at least the courtesy of a reply—on account of the



interest I have taken in your case. Of course, if you do not wish to treat with me, it is immaterial, but a young man in your condition, and thinking of marrying while you are physically and sexually weak, is exhibiting a very pronounced lack of common sense, and dishonest with himself and those who will be dependent upon him in future years. You may be able to stave off matters for a time but the day will come when you will regret your carelessness. I say this candidly to you. I believe in talking plainly to men. It does no good to conceal from a man the things he should know. You have told me that you considered marriage. Would you attempt such a thing in your present weakened condition, and while you are sustaining a loss that each and every day is leaving you more unfit to attend to your family duties. Can you let this waste go on until your sexual organs have wasted and decreased to such an extent that you are unable to provide your faithful and expectant wife with the happiness she naturally expects and must have to make the [13] home circle happy, contented and peaceful. Can you afford to let your condition become such that it will cause you shame, and your wife disgrace and humiliation. No, deep down in your intuitive understanding you know that you cannot. Then why not remedy these matters, as can be done if you take the proper and immediate steps. I can bring about a restoration providing you come to me now, and follow out my instructions and advice.

It may be possible that my former letters did not reach you. If they did, it seems to me that you

would reply ere this. However, they may have been held up in the postoffice, and providing I don't hear from you in reply to this within a reasonable time, I will write the postmaster to kindly see that you get these letters, and explain to him that this is necessary on account of the condition that you are in, as I want to see you right before you get married. I deem it my duty as a physician to advise you not to neglect your case. I have always taken a strong interest in young men—and want them to be in proper physical and sexual condition before they take such steps as may prove embarrassing later.

I made you a very liberal fee, considering my reputation and ability as a physician in the medical and scientific world, of \$50.00 cash in advance for your case. In order to make it easy for you, as I want to help you in every way possible, I stated that if you could not send the whole amount at once, to send me \$20.00 by return mail and pay me \$10.00 a month thereafter. Isn't this fair. By taking the installment plan of paying, you can readily discontinue treatment after the first month or so providing you were not being benefitted. Of course, I do not wish to cause the impression that yours is an easy case. It will take a few months to put you in such condition as you should be in. Let me hear from you at once so I will know what to do with my records of your case. I must have some data before I can file same, and don't wish to annoy you with unnecessary correspondence. I thank you for your courtesy.

Yours sincerely

Dr. L. J. JORDAN."

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

#### FOURTH COUNT.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: THAT Dr. GIDEON M. FREEMAN, *alias* PAUL ALLEN, doing business at No. 986 Market Street, in the City and County of San Francisco, in the State and Northern District of California, under the name of Dr. Jordan, L. J. Jordan Co. and Jordan's Museum of Anatomy, a corporation organized and existing under and by virtue [14] of the laws of the State of California, late of the said State and District, heretofore, to wit, on or about the fifteenth day of May in the year of our Lord, one thousand nine hundred and twelve, in the City and County of San Francisco, State and Northern District of California, within the jurisdiction of this Court, and under the guise and name of the said Jordan's Museum of Anatomy, devised a certain scheme or artifice to defraud, or for obtaining money or property by means of certain false pretenses, representations or promises to be effected by means of the postoffice establishment of the United States, which said scheme or artifice is in substance and effect as follows:

That he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, should place or cause to be placed, advertisements in certain newspapers of general circulation published within the United States, or in let-

ters, booklets or other prints, wherein it should be set forth in substance or effect that the said Dr. Jordan was a physician practicing in the City and County of San Francisco, State of California, and specifically qualified to treat private diseases of men, that is to say, among other diseases, syphilis (blood poison), gonorrhea, and diseases and affections arising therefrom, lost vitality, bladder, kidney, prostatic and urinary diseases and had cured numerous persons afflicted with said diseases, and by means of said advertisements, letters, booklets or other prints, he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, then and there intended to cause or induce John Bammer, J. P. Millspaugh, George R. Alberts, Anson Ashford, and John Caroway, and divers other persons whose names are to the Grand Jurors aforesaid, unknown, and the public generally, to communicate and open correspondence with Dr. Jordan, by means of the postoffice establishment of the United States relative to their real or supposed [15] ailments; that when said persons should communicate with him, the said Dr. Jordan, whom he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, then and there well knew was not a doctor or person existing in life or in fact during all the times set forth in this indictment, by the means aforesaid, that the said Dr. Jordan should write or communicate with said persons by means of letters placed in the said postoffice establishment of the United States, and in substance and effect should state to each of such persons, with intent to defraud each and all of said persons, irrespective of the symptoms there-



tofore communicated as aforesaid to him, and even in cases where the symptoms indicated health rather than disease, and without any proper knowledge of the real condition of said persons, that they, the said persons, were afflicted with diseases which he, the said Dr. Jordan, could cure, and that he would furnish treatments for the cure of such alleged diseases upon the payment to him of certain sums of money; and that by means of said letters so placed as aforesaid, by the said Dr. Gideon M. Freeman, *alias* Paul Allen, he then and there intended to cause or induce all of said persons so communicating with the said Dr. Jordan as aforesaid, to deliver or send to the address of Dr. Jordan, sums of money for the purpose of procuring from him (as said persons had been led to believe), medicine or treatments skilfully or properly designed or prepared for the cure or alleviation of the diseases with which said persons were afflicted, or had been so induced by said Dr. Gideon M. Freeman, *alias* Paul Allen, to believe themselves to be afflicted, which said sums of money, so sent or delivered to the said Dr. Jordan as aforesaid, he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, should fraudulently convert or appropriate to his own use, and in return therefor, should send or deliver to each of said persons so sending or delivering [16] to him sums of money, certain medicine or treatment not skilfully or properly designed or prepared, and of little or no value, for the cure of the aforesaid persons, Dr. Gideon M. Freeman, *alias* Paul Allen, then and there having no



proper or professional knowledge of such persons' condition, or whether such persons were diseased or not, or whether or not such purported medicine or treatment was capable of benefitting said persons, as he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, then and there well knew.

And he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, on the seventh day of November 1912, at the City and County of San Francisco, in the State and Northern District of California, for the purpose of executing said scheme and artifice, or in attempting so to do, unlawfully, feloniously, knowingly and wilfully, did place or cause to be placed in the postoffice establishment of the United States, at San Francisco, in the State and District afore-said, or in a station, street box or letter-box thereof, an authorized depository for mail matter, to be sent or delivered by the postoffice establishment of the United States, a certain letter upon which the postage had been fully prepaid, and addressed to Mr. Anson Ashford, Buckley, Wash., a copy of said letter being as follows, to wit:

"Office of  
Dr. L. J. Jordan,  
986 Market St.  
Opposite Sixth  
Hours: 9 A. M. to 5 P. M.  
and 7 to 9 P. M.  
Sundays, 10 to 12 A. M.

Private Address:  
Paul Allen,  
986 Market Street.

Jordan's Museum of  
Anatomy.  
Established 50 years,  
Diseases of Men.

San Francisco, Cal., Nov. 7, 1912.

Mr. Anson Ashford,  
Buckley, Wash.

Dear Sir and Friend:—

I thank you for your remittance of \$2.50 which I have credited to your account. I also received the

sample of urine, and the question blank, and other data. Same was carefully [17] considered and the urine analyzed, and I find your condition is quite serious. The urine shows large percentages of sugar, showing a serious condition known as Diabetes. Immediate treatment is necessary, and my suggestion would be that you take up treatment at once. This is affecting the kidneys and no doubt causes the pains you mention. Do you ever feel a numb feeling at the ends of your fingers, or toes, ears, nose, etc? Your condition is very weak, as is shown by emissions at night and it is my opinion that your case is quite complicated. The losses at night have a tendency to weaken you, and derange the nervous and sexual systems. It causes loss of appetite, little desire for work; lack of memory; embarrassment; pains in sexual organs; weak eyes, lack of confidence and strength. The cells, muscles and tissues become wasted through an insufficient supply of blood or blood that is very much decreased in nourishing power. Your system needs a strong tonic and restorative, not merely a stimulant. Something that will build new blood, new bone, new muscle and new tissue, and throw off the decayed and waste substances, engorging the parts with a supply of fresh, pure blood, and building the entire system up to normal.

Whether you treat with me or not—I advise you to seek at once the services of a competent and reputable physician; one that you know is above the average. If you do treat with me, I can promise you

results if you give me your co-operation and follow out my instructions and advice. I want no man's case unless he is honest and sincere and wants to be benefited. I am a very busy man and have no time to dissipate with triflers. From the fact that you sent me \$2.50 for a report, I think you are sincere and that you would make a desirable patient. I have spent the greater part of a lifetime treating, studying and curing the diseases of men, and have won a reputation that is second to none by my fair methods to all.

I am willing to take your case on that condition—namely that you will obey my instructions and take my treatment faithfully. I will give you credit for the \$2.50 you paid me, and send you the first month's medicines for \$22.50. Then I will reduce your fee after the first month to \$15.00 a month. I make this offer of monthly payments as it may be more convenient for you to pay in this manner. A few months will put you in good condition, and if you start now, you will notice very good results in a short time—but my dear young man, whatever you do, don't let this condition run along. If you want help, I can give it to you and would like to have your case at once. May I expect you on my list by return mail? You have youth and perhaps a good constitution, and your rapid and complete recovery should be gained without the possibility of failure.

Hoping to have your remittance by return mail, I am,

Yours sincerely,  
Dr. L. J. JORDAN."

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided. [18]

FIFTH COUNT.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present; THAT

DR. GIDEON M. FREEMAN, *alias* PAUL ALLEN,

doing business at No. 986 Market Street, in the City and County of San Francisco, in the State and Northern District of California, under the name of Dr. Jordan, L. J. Jordan Co. and Jordan's Museum of Anatomy, a corporation organized and existing under and by virtue of the laws of the State of California, late of the said State and District, heretofore, to wit, on or about the fifteenth day of May in the year of our Lord, one thousand nine hundred and twelve, in the City and County of San Francisco, State and Northern District of California, within the jurisdiction of this Court, and under the guise and name of the said Jordan's Museum of Anatomy, devised a certain scheme or artifice to defraud, or for obtaining money or property by means of certain false pretenses, representations or promises to be effected by means of the postoffice establishment of the United States, which said scheme or artifice is in substance and effect as follows:

That he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, should place or cause to be placed, advertisements in certain newspapers of general circu-



lation published within the United States, or in letters, booklets or other prints, wherein it should be set forth in substance or effect that the said Dr. Jordan was a physician practicing in the City and County of San Francisco, State of California, and specifically qualified to treat private diseases of men, that is to say, among other diseases, syphilis (blood poison), gonorrhea, and diseases and affections arising therefrom, lost vitality, bladder, kidney, prostatic and urinary diseases, and had cured numerous persons afflicted with said diseases, [19] and by means of said advertisements, letters, booklets or other prints, he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, then and there intended to cause or induce John Bammer, J. P. Millspaugh, George R. Alberts, Anson Ashford, and John Caroway, and divers other persons whose names are to the Grand Jurors aforesaid, unknown, and the public generally, to communicate and open correspondence with Dr. Jordan, by means of the postoffice establishment of the United States relative to their real or supposed ailments; that when said persons should communicate with him, the said Dr. Jordan, whom he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, then and there well knew was not a doctor or person existing in life or in fact during all the times set forth in this indictment, by the means aforesaid, that the said Dr. Jordan should write or communicate with said persons by means of letters placed in the said postoffice establishment of the United States, and in substance and effect should state to each of such per-



sons, with intent to defraud each and all of said persons, irrespective of the symptoms theretofore communicated as aforesaid to him, and even in cases where the symptoms indicated health rather than disease, and without any proper knowledge of the real condition of said persons, that they, the said persons, were afflicted with diseases which he, the said Dr. Jordan, could cure, and that he would furnish treatments for the cure of such alleged diseases upon the payment to him of certain sums of money; and that by means of said letters so placed as aforesaid, by the said Dr. Gideon M. Freeman, *alias* Paul Allen, he then and there intended to cause or induce all of said persons so communicating with the said Dr. Jordan as aforesaid, to deliver or send to the address of Dr. Jordan, sums of money for the purpose of procuring from him (as said persons had been led to believe), medicine or treatments [20] skilfully or properly designed or prepared for the cure or alleviation of the diseases with which said persons were afflicted, or had been so induced by said Dr. Gideon M. Freeman, *alias* Paul Allen, to believe themselves to be afflicted, which said sums of money, so sent or delivered to the said Dr. Jordan as aforesaid, he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, should fraudulently convert or appropriate to his own use, and in return therefor, should send or deliver to each of said persons so sending or delivering to him sums of money, certain medicine or treatment not skilfully or properly designed or prepared, and of little<sup>1</sup> or no value, for the cure of the aforesaid persons, Dr. Gideon M. Freeman, *alias*

Paul Allen, then and there having no proper or professional knowledge of such persons' condition, or whether such persons were diseased or not, or whether or not such purported medicine or treatment was capable of benefiting said persons, as he, the said Dr. Gideon M. Freeman, *alias* Paul Allen, then and there well knew.

And he, the said Doctor Gideon M. Freeman, *alias* Paul Allen, on the twenty-first day of September, in the year of our Lord, one thousand nine hundred and twelve, at the City and County of San Francisco, in the State and Northern District of California, for the purpose of executing said scheme and artifice, or in attempting so to do, unlawfully, feloniously, knowingly and wilfully, did place or cause to be placed in the postoffice establishment of the United States at San Francisco, in the State and District aforesaid, or in a station, street-box or letter-box thereof, an authorized depository for mail matter, to be sent or delivered by the postoffice establishment of the United States, a certain letter upon which the postage had been fully prepaid, and addressed to Mr. John Caroway, Oroville, Calif., a copy of which said letter [21] being as follows, to wit:

"Office of  
Dr. L. J. Jordan,  
986 Market St.  
Opposite Sixth  
Hours: 9 A. M. to 5 P. M.  
and 7 to 9 P. M.  
Sundays, 10 to 12 A. M.

Private Address:  
Paul Allen,  
986 Market Street.

Jordan's Museum of  
Anatomy.  
Established 50 years,  
Diseases of Men.

San Francisco, Cal., Sept. 21, 1912.

Mr. John Caroway,  
Oroville, Calif.

Dear Sir:

If a man came along and offered you \$2.50, or the

opportunity to make this amount, would you refuse the offer? If you are a young man working for a daily, or weekly, or monthly wage, wouldn't an offer of this kind appeal to you. I have offered you the opportunity several times to do this—to make a clean saving of \$2.50, but you have failed thus far to accept. It would be an investment of \$2.50 towards health insurance, by far the greatest insurance in the world—for good health is the most valuable asset of mankind. Charity begins at home. Be charitable to yourself. One can go on for a time fooling themselves, but you cannot fool nature. Our Creator, through his natural gifts, intended that each and every one of us should be healthy, which means happiness, freedom from worry, content and *dolce far niente*.

It is only through sickness, abuse, excess, or accident that we become weakened; that some of the organs refuse to perform their functions satisfactorily. The organs become weak, and cannot retain the vital fluid that sustains and buoys up the system. Once this loss commences, a warning is given that something is radically wrong. The vital drain saps the virility, energy and physical vigor of the entire body—causing a feeling of ennui, drowsiness, lack of energy, sleepiness, in fact feelings that are indescribable.

Can you not spare 5 minutes of your busy time to write me when you intend taking up treatment? I know you are perhaps very busy—but if you have the time to read my letters, you can at least spare time to answer this one—either one way or the other.

Remember, I don't want your case after your system has become so weakened and broken down that no doctor, or no treatment can restore you. Send me \$12.50, a saving of \$5.00 and I will send you the first month's medicine at once.

Very sincerely,  
Dr. L. J. JORDAN."

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

JNO. W. PRESTON,  
United States Attorney.

Names of witnesses appearing before the Grand Jury.

JAMES O'CONNELL.  
HONRERY.

[Endorsed]: A True Bill. Curran Clark, *pro tem*. Foreman Grand Jury. Presented in Open Court and Filed Apr. 20, 1915. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [22]

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At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 21st day of April, in the year of our Lord, one thousand nine hundred and fifteen. PRESENT: The Honorable WM. C. VAN FLEET, Judge.



No. 5686.

UNITED STATES OF AMERICA.

vs.

DR. GIDEON M. FREEMAN.

**(Arraignment and Plea.)**

In this case the defendant was present in court with his attorney, Charles H. Fairall, Esq., and on motion of W. E. Hettman, Esq., Assistant United States Attorney, said defendant was duly arraigned upon the Indictment herein against him, stated his true name to be Gideon M. Freeman, waived reading of Indictment, and then and there plead Not Guilty to the charge contained in said Indictment, which plea the Court ordered, and the same is hereby, entered. Further ordered, on like motion, that this case be, and the same is hereby, continued until April 22d, 1915, to be set for the trial of said defendant. Further ordered that said defendant go at large upon his own recognizance until said April 22d, 1915.

[23]

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At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 22d day of April in the year of our Lord, one thousand, nine hundred and fifteen. PRESENT: The Honorable M. T. DOOLING, Judge.



No. 5686.

UNITED STATES OF AMERICA

vs.

G. M. FREEMAN.

**(Order Allowing Filing of Demurrer Nunc Pro Tunc.)**

This case came on regularly this day to be set for the trial of defendant herein, who was present in court with his attorney, Charles H. Fairall, Esq., and W. E. Hettman, Esq., appeared on behalf of the United States. Thereupon, on motion of Mr. Fairall and Mr. Hettman consenting thereto, the Court ordered that defendant may demur to the Indictment herein on or before April 26th, 1915, as of April 21st, 1915, the date of the defendant's plea to said Indictment, and that said Demurrer when so presented be filed *nunc pro tunc* as of said April 21st, 1915. Further ordered, on like motion, that defendant go on his own recognizance as to this Indictment upon the Bond heretofore given for his appearance in the case of the United States of America vs. G. M. Freeman et al., No. 5523. Further ordered that the trial of said defendant be and the same is hereby set for April 26th, 1915, at 10 o'clock A. M. [24]

*District Court of the United States, in and for the  
Northern District of California.*

UNITED STATES OF AMERICA

Plaintiff,

vs.

GIDEON M. FREEMAN,

Defendant,

**(Demurrer to Indictment.)**

Comes now the defendant, Gideon M. Freeman, and demurs to the Indictment, and for cause of demurrer alleges:

I.

This case came an regularly this day to be set for

That said indictment does not state facts sufficient to constitute an offense against the laws of the United States:

II.

That neither said indictment, nor any count thereof, states facts sufficient to constitute any offense against the United States, or the laws thereof, for the reasons following, to wit:

1. That said indictment does not allege or show the manner or means of obtaining moneys by false or fraudulent pretenses, representations, or promises;

2. That said indictment does not allege that the scheme devised by defendant was to be executed by means of false or fraudulent pretenses, representations, or promises;

3. That said indictment does not allege how said scheme was to be executed;

4. That said indictment does not allege that the per-

sons to be deceived had ever seen said, or any letters, which are alleged to have been deposited in, or sent by, the defendant through the mails of the United States, or that said persons had any knowledge of any such letters, or were in any wise deceived thereby, or that [25] said letters deceived, or were intended to deceive any one;

5. That said indictment does not allege that said scheme set out therein was used or intended to defraud, or was illegal, or was calculated to deceive any person of ordinary comprehension or prudence;

6. That said indictment does not allege that said representations made, as alleged in said indictment, were not true;

7. That said indictment does not directly or positively set out the specific scheme or artifice, which it is alleged defendant devised or entered into;

8. That said indictment does not allege that the persons writing such letters were not suffering from the diseases, or some disease, which defendant was able and intended to treat with skill and success;

9. That said indictment does not allege that defendant knew that the medicines were, or any medicine sent by him as aforesaid to said afflicted persons, was of little or no value, or that he intended to send medicines which he knew were of little or no value;

10. That said indictment does not allege that defendant had no knowledge of such person's condition, or whether such person was diseased, or whether said medicine so sent was capable of benefiting said persons;

11. That said indictment does not allege that said

medicine was incapable of benefiting said persons, or that said persons were not diseased, or that the defendant had no knowledge of their condition, or that defendant knew that said medicine was incapable of benefiting said persons, or knew that said persons were not diseased.

WHEREFORE, defendant prays that said indictment be dismissed.

CHARLES H. FAIRALL,  
Attorney for Defendant.

[Endorsed]: Filed in open court April 26, 1915, *nunc pro tunc* as of April 21st, 1915. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [26]

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At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 26th day of April, in the year of our Lord one thousand nine hundred and fifteen. PRESENT: The Honorable M. T. DOOLING, Judge.

No. 5686.

UNITED STATES OF AMERICA

vs.

G. M. FREEMAN.

**Minutes of Trial—April 26, 1915.**

This case came on regularly this day for the trial of defendant, G. M. Freeman, who was present in court with his attorney, Charles H. Fairall, Esq., and John W. Preston, Esq., and W. E. Hettman,

Esq., appeared on behalf of the United States. Mr. Fairall presented and filed, *nunc pro tunc* as of April 21st, 1915, a Demurrer to the Indictment herein. Thereupon, the Court ordered that said Demurrer be, and the same is hereby, overruled. Thereupon, both parties answered ready for trial upon said Indictment and the Court ordered that the said trial do now proceed and that the jury-box be filled from the regular Panel of Trial Jurors of this court and accordingly the hereinafter named persons were duly drawn by lot, sworn and examined, to wit: Fred Lovegren, accepted, W. B. Sanborn, peremptorily challenged by defendant and excused, Chas. Keyer peremptorily challenged by United States and excused, H. H. Scott, George Makins, Thomas P. Gilhooly, accepted, E. W. Conolley and Thomas Davis, peremptorily challenged by defendant and excused, A. W. Von Rhein, Warren Spieker, F. L. Wight, accepted, E. L. Oliver and Geo. F. Neal peremptorily challenged by defendant and excused, K. A. [27] Lundstrum, accepted, Thos. W. Collins, peremptorily challenged by United States and excused, S. B. Pauson accepted, Augustus M. Skelly, peremptorily challenged by United States and excused, Henry Wagenheim, excused by consent of both parties, Sol. Zeman-sky, accepted, Chas. W. Weld peremptorily challenged by defendant and excused, A. C. Rulofson and Wm. F. Ohm accepted. Thereupon, twelve persons



having been accepted as Jurors to try the defendant herein, were accordingly sworn, viz.:

Fred Lovegren,	F. L. Wight,
H. H. Scott,	K. A. Lundstrum,
George Makins,	S. B. Pauson,
Thomas P. Gilhooly,	Sol. Zemansky,
A. W. Von Rhein,	A. C. Rulofson,
Warren Spieker,	Wm. F. Ohm.

Mr. Hettman then made statement of case to Court and Jury and called B. D. Beckwith, George E. McMurray, F. D. Crable, F. W. France, W. L. Leonard and G. A. Leonard, each of whom were duly sworn and examined on behalf of the United States and filed for identification certain exhibits which were marked U. S. Exhibits, for Identification, "A," "B," "C," "D," and "E," (packages of letters, etc., and book as part of exhibit "B"), and later introduced in evidence exhibit "A," (for identification), which was marked U. S. Exhibit 1, "B," (for identification), which was marked U. S. Exhibit 2, and "E," (for identification), which was marked U. S. Exhibit 3.

Thereupon, the hour of adjournment having arrived, the Court ordered that the further trial herein be continued until April 27th, 1915. [28]

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 27th day of April, in the year of our Lord, one thousand nine hundred and fifteen. PRESENT: The Honorable M. T. DOOLING, Judge.

No. 5686.

UNITED STATES OF AMERICA

vs.

G. M. FREEMAN.

**Minutes of Trial—April 27, 1915.**

The trial of the defendant herein was this day resumed, the jury being present and complete. Defendant was present in court with his attorney Charles H. Fairall, Esq., and John W. Preston, Esq., and W. E. Hettman, Esq., appeared on behalf of the United States. Mr. Preston called Edmond Honvery, H. C. Walker, Edward Boerner, A. J. Gock, James T. Burns, Dr. Fletcher McNut and Dr. Dudley Tait, each of whom were duly sworn and examined on behalf of the United States and introduced in evidence certain exhibits which were filed and marked U. S. Exhibits 4 (letters, etc., being U. S. Exhibit "C," for Ident.), 5 (book, being part of U. S. Exhibit "B," for Ident.), 6 (bottle), which was filed as of this date, 7 (letters etc. being U. S. Exhibit "D," for Ident.), and the following exhibits which were filed and marked U. S. Exhibits 8 (letters, etc.),

9 (card), 10 (2 checks), 11, 12, and 13 (books), 14 (affidavit), and 15 (2 affidavits).

Thereupon the hour of adjournment having arrived, the Court ordered that the further trial be and the same is hereby, continued until April 28th, 1915, at 10 o'clock A. M. [29]

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At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 28th day of April in the year of our Lord, one thousand nine hundred and fifteen: PRESENT: The Honorable M. T. DOOLING, Judge.

No. 5686.

UNITED STATES OF AMERICA

vs.

DR. GIDEON M. FREEMAN, et al.

**Minutes of Trial—April 28, 1915.**

The trial of the defendant herein was this day resumed, the jury being present and complete. Defendant was present with his attorney Charles H. Fairall, Esq., and John W. Preston, Esq., and W. E. Hettman, Esq., appeared on behalf of the United States. Upon the calling of the case Mr. Preston stated that a subpoena issued to "Dr. Jordan Museum, or Paul Oestings, President, or Gideon M. Freeman, Secretary, 986 Market St., S. F. Calif.," to produce certain books, etc., of the corporation, had not been complied with and requested that the Court

investigate said matter. Whereupon, the Court excused the jury from the courtroom and proceeded accordingly. Mr. Preston then called Paul Oesting, A. M. Robinson, J. T. Burns, E. J. Rice and defendant G. M. Freeman, each of whom were duly sworn and examined as to said matter. Thereupon, after hearing Mr. Fairall, the Court ordered that the parties herein produce all books, letters, etc., now in their possession covered by said subpoena, and accordingly Mr. Fairall presented certain files, letters, etc. Thereupon, the Court ordered that the trial of the defendant do now proceed and that the jury accordingly return into court.

Mr. Preston then called Dr. Henry McGarvey, A. J. McDonald, William C. White and Lyman F. Kebler, who were each duly sworn and [30] examined on behalf of the United States and thereupon rested the case on behalf of the United States. Mr. Fairall then made a motion to strike out all of the evidence introduced herein and after hearing Mr. Fairall, the Court ordered that the said motion be, and the same is hereby, denied. Mr. Fairall also made a motion to instruct the jury to acquit upon the ground of the insufficiency of the evidence herein, which motion the Court likewise denied. Mr. Fairall then called A. M. Robinson and G. M. Freeman (defendant), each of whom were duly sworn and examined on behalf of said defendant.

Thereupon the hour of adjournment having arrived, the Court ordered that the further trial of this case be, and the same is hereby, continued until April 29th, 1915, at 10 o'clock A. M. [31]

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 29th day of April, in the year of our Lord, one thousand, nine hundred and fifteen. PRESENT: The Honorable M. T. DOOLING, Judge.

No. 5686,

UNITED STATES OF AMERICA,

vs.

G. M. FREEMAN, et al.

**Minutes of Court—April 29, 1915.**

The trial of defendant G. M. Freeman was this day resumed, the jury being present and complete. Defendant was present with his attorney Charles H. Fairall, Esq., and John W. Preston, Esq., and W. E. Hettman, Esq., appeared on behalf of the United States. Mr. Fairall recalled the defendant G. M. Freeman for further examination and thereupon submitted the case on behalf of the defendant. The said case was then argued by Mr. Hettman, Mr. Fairall and Mr. Preston and submitted. The Court then proceeded to instruct the jury, who at 2 o'clock and 45 minutes P. M., retired to deliberate upon the verdict and subsequently returned into court at 3 o'clock P. M., and upon being called all twelve jurors answered to their names and were found to be present and in answer to a question of the Court stated that they had agreed upon a verdict and presented



a written verdict, which the Court ordered filed and recorded and which verdict is as follows:

“We, the Jury, find Gideon M. Freeman, the defendant, at the Bar, Guilty as charged in the Indictment.

“A. C. RULOFSON,  
Foreman.”

Thereupon, the Court ordered that defendant be and appear for [32] Judgment on May 5th, 1915, at 10 o'clock A. M., and that he go upon the bond heretofore given for his appearance, pending such judgment. Further ordered that the jurors herein be, and they are hereby, excused from further attendance upon the Court until April 30th, 1915, at 10 o'clock A. M. [33]

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*In the District Court of the United States, in and for  
the Northern District of California, First Division.*

No. 5686,

THE UNITED STATES OF AMERICA

vs.

DR. GIDEON M. FREEMAN.

**Verdict.**

We, the jury, find Gideon M. Freeman, the defendant at the bar, Guilty as charged in the indictment.

A. C. RULOFSON,  
Foreman.

[Endorsed]: Filed April 29th, 1915, at 3 o'clock P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [34]

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At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 15th day of May, in the year of our Lord, one thousand nine hundred and fifteen. PRESENT: The Honorable M. T. DOOLING, Judge.

No. 5686.

UNITED STATES OF AMERICA

vs.

GIDEON M. FREEMAN.

**Minutes of Court—May 15, 1915—Judgment.**

This case came on regularly this day for the pronouncing of Judgment upon the defendant herein. John W. Preston, Esq., was present on behalf of the United States. Defendant was present with his attorney Charles H. Fairall, Esq., and thereupon defendant was called for Judgment and duly instructed as to his conviction herein and asked if he had any legal cause to show why Judgment should not be pronounced herein against him. Thereupon Mr. Fairall made a motion to set aside the verdict therein and motion for a new trial, and after hearing Mr. Fairall, the Court ordered that said motions be, and the same are hereby, denied. Mr. Fairall then made

motion in arrest of judgment, which motion the Court likewise denied and to which rulings Mr. Fairall then and there entered an Exception. Thereupon, no sufficient cause being shown or appearing to the Court why such Judgment should not be pronounced, it is ordered that said defendant G. M. Freeman, for the offense of which he stands convicted, pay a fine in the sum of one thousand (\$1,000) dollars and that he be imprisoned for the period of one year in the County Jail of Alameda County, State of California, and in default of the payment of said fine [35] said defendant be further imprisoned until said fine is paid or he be otherwise discharged by due process of law. Further ordered that defendant be committed to the custody of the United States Marshal for this District to execute said Judgment of Imprisonment and that Commitment issue accordingly. Further ordered that the execution of said Judgment be stayed for a period of thirty days from the date hereof. [36]

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*In the District Court of the United States, for the  
Northern District of California, First Division.*

No. 5686.

THE UNITED STATES OF AMERICA

vs.

GIDEON M. FREEMAN.

**Judgment on Verdict of Guilty.**

Convicted of Using U. S. Mails for Scheme to Defraud.

John W. Preston, Esq., United States Attorney, and the defendant with his counsel, Charles H. Fairall, Esq., came into court. The defendant was duly informed by the Court of the nature of the Indictment filed on the 20th day of April, A. D., 1915, charging him with the crime of using U. S. mails for scheme to defraud; of his arraignment and plea of Not Guilty; of his trial and the verdict of the jury on the 29th day of April, A. D. 1915, to wit: "We, the jury, find Gideon M. Freeman, the defendant at the bar, Guilty as charged in the Indictment, A. C. Rulofson, Foreman."

The defendant was then asked if he had any legal cause to show why judgment should not be entered herein, and no sufficient cause being shown or appearing to the Court; and the Court having denied a motion to set aside the verdict, motion for new trial, and motion in arrest of judgment, the Court thereupon proceeded to render its Judgment;

THAT WHEREAS, the said Gideon M. Freeman, having been duly convicted in this court of the crime of using U. S. mails for scheme to defraud;

IT IS THEREFORE ORDERED AND ADJUDGED that the said Gideon M. Freeman be imprisoned in the Alameda County Jail, Alameda County, California, for the period of one (1) year, and that he pay a fine in the sum of \$1,000; in default of the payment of [37] said fine the said Gideon M. Freeman, to be further imprisoned until

said fine be paid or until he be otherwise discharged by due course of law.

Judgment entered this 15th day of May, A. D. 1915.

W. B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk. [38]

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*In the District Court of the United States, for the  
Northern District of California, First Division.*

No. 5686.

UNITED STATES

vs.

GIDEON M. FREEMAN.

**Certificate of Clerk, U. S. District Court to  
Judgment-roll.**

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

ATTEST my hand and the seal of said District Court, this 15 day of May, 1915.

W. B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk.

[Endorsed]: Filed May 15, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy. [39]



*In the District Court of the United States, for the  
Northern District of California, First Division.*

No. 5686.

THE UNITED STATES OF AMERICA,  
Plaintiff,  
vs.  
DR. GIDEON M. FREEMAN,  
Defendant.

**Defendant's Bill of Exceptions.**

BE IT REMEMBERED: That on the 26th day of April, 1915, at a stated term of the District Court of the United States for the Northern District of California, First Division, the above-entitled cause came on regularly for trial before Honorable MAURICE T. DOOLING, United States District Judge, presiding: John W. Preston, Esq., United States Attorney for the Northern District of California, and Walter Hettman, Esq., Assistant United States Attorney for the Northern District of California, appearing for the plaintiff, and Charles H. Fairall, Esq., appearing for the defendant:

THEREUPON a jury was regularly empaneled and sworn according to law, Mr. Hettman made an opening statement for the prosecution, and the evidence hereinafter following was introduced and the following proceedings occurred:

**Testimony of B. D. Beckwith, for Plaintiff.**

B. D. BECKWITH, called as a witness on behalf of the United States, after being duly sworn, testified as follows: My name is B. D. Beckwith. I am in the abstract business at Colusa. Throughout the years 1912 and 1913, I was postmaster at Colusa. In that capacity, I had correspondence with the Jordan Museum or Dr. L. J. Jordan Company, a corporation, by [40] means of letters sent to me by postal inspectors. I carried on such correspondence under the name of John Bammer. I believe I carried on this correspondence with postoffice inspector, Mr. G. A. Leonard. The memorandum which you show me is an affidavit of mailing that I made for Mr. Leonard. The circumstances under which I made that are: I received this affidavit with a letter to mail, and I mailed the letter and forwarded the certificate. I mailed the letter to Dr. Jordan, 986 Market Street, San Francisco. The date I made this is May 26, 1912. I am not certain that I received a letter May 26, 1912, from Mr. George A. Leonard, postal inspector, which I placed in the mails and sent to the Jordan Museum, but I forwarded the letter on that date. I may have received it a few days prior to that. I received a reply letter under the name of John Bammer to be sent to Mr. Leonard, from the Jordan Museum. This letter, dated May 27, 1912, I believe is the first one that I received. I enclosed that in another envelope and forwarded it to Mr. Leonard. I identify this envelope with the next letter. I received that

(Testimony of B. D. Beckwith.)

in the mail addressed to John Bammer and enclosed it in another envelope and forwarded it to Mr. Leonard. I am able to identify the others in the same way. I sent the letter noted on this memorandum, June 29, 1912; that letter was procured from Mr. Leonard. I also received this letter from the Jordan Museum Company, or Dr. Jordan, Incorporated, and forwarded it to Mr. Leonard. I am able to identify all of these as having passed through my hands.

#### Cross-examination.

I do not know who wrote these. I have marks on the envelopes to indicate that these are the letters I received. None on the letters. I remember my mark on the letters; I remember I marked the letters. I remember having received these letters, and I also [41] remember my mark on them, on the envelope. I do not identify from the mark on the envelope the contents of the envelope. I do not know anything about whether these letters are the ones that were in the envelopes or not.

#### Redirect Examination.

When I received the letters from Mr. Leonard to mail under the name of John Bammer, I did not disturb the contents in any way—they were sealed. When I received the letters from Dr. Jordan Company, I did not look at the contents, sent them as they were.

#### Recross-examination.

The letters came sealed to me, and I do not know where they came from, except from the postmark

(Testimony of B. D. Beckwith.)

on them; they are postmarked at San Francisco, and then they are stamped on the back. I do not know that they came from the Jordan Museum, or Dr. Jordan, as I did not see them mailed. I received them at Colusa. I certainly do not know that they came from this company, nor that he had anything to do with it, nor anything about it.

**Testimony of George E. McMurray, for Plaintiff.**

GEORGE E. McMURRAY, called as a witness on behalf of the United States, after being duly sworn, testified as follows:

My name is George E. McMurray. I am postmaster at Cherry Creek, Nevada, and have been so employed during the years 1912 and 1913. I had correspondence with Mr. G. A. Leonard, postal inspector, with regard to sending letters to the Dr. Jordan Company. I received letters, and under instructions mailed those letters. The memorandum there represents my affidavit as postmaster, that I mailed a certain letter described in there, a letter dated December 18, 1912. I got that letter under cover from Inspector G. A. Leonard, Washington, D. C. That letter was addressed to Dr. Jordan, 986 Market Street, San Francisco, and I placed it in the mail myself [42] personally. I made that memorandum on that date myself. Letters came to my postoffice addressed to J. P. Millspaugh. I enclosed such letters in an official envelope—first initialed them and then stamped the date on the back and enclosed them in an official envelope addressed to



(Testimony of George E. McMurray.)

Inspector G. A. Leonard, Washington, D. C. These are my initials on the back of the envelope you now show me. The letter I do not know anything about. I mailed that letter to Mr. Leonard in Washington, D. C. These other envelopes you now show me passed through my hands. I received them January 4th, and sent them on January 5th. I also mailed the letter described here on the date January 8, 1913, addressed to Paul Allen, 986 Market Street, San Francisco. I got the letter from Inspector Leonard, Washington, D. C. I received a number of letters addressed to Millspaugh, which I sent on to Leonard after the mailing of that one. I identify the envelope attached here dated, February 8, 1913, and February 13, 1913. After that date, as it is quite a while ago, I do not know that I mailed any more letters to Dr. L. J. Jordan Company. I mailed quite a number of letters that were sent to me by Mr. Leonard. I see here a letter that I mailed, dated February 23d. The contents of that letter were sealed when I received it and when I mailed it. That envelope I received February 27th and mailed to Washington February 28th, initialed and dated. Another envelope I received March 9th and mailed to Washington March 10, 1913. Another envelope I received March 20th and sent to Washington March 21, 1913. Another envelope I received March 30, initialed and sent to Washington March 31, 1913. All these letters that I received addressed to Millspaugh, I forwarded on to Mr. Leonard at Washington, D. C.,



(Testimony of George E. McMurray.)

without opening them; and the letters I received from Inspector Leonard, I forwarded to their various addresses without opening.

(Documents marked exhibit "A" and exhibit "B" for Identification.) [43]

**Testimony of F. D. Crable, for Plaintiff.**

F. D. CRABLE, called as a witness on behalf of the United States, after being duly sworn, testified as follows:

My name is F. D. Crable. I reside at Flagstaff, Arizona, which is in the southeastern part of the State. I was postmaster at Tombstone from 1907 until the latter part of 1912. As such postmaster I received from the postoffice department envelopes that were addressed to a man named Dr. L. J. Jordan. I do not recall the name of the man from whom I received those envelopes, but they were from the postoffice inspector. They came from the postoffice inspector. I do not remember whether Washington or San Francisco. The envelopes I received I mailed at the office. I was postmaster at the time. They had stamps on them and I cancelled the stamps in the regular course of business. The envelopes were addressed to some institution in San Francisco. I could identify the envelopes if I were to see them. At the time I received these envelopes for mailing, they appeared to have something inside of them. They were sealed. I had instructions from the department about the name of the party that was supposed to be the signer of the letters contained in the envelopes. I do not recall having re-

(Testimony of F. D. Crable.)

ceived any letters addressed to a man named George R. Albert. In the package of correspondence you show me, purporting to be letters sent and received through my office, I recognize some of the envelopes that came in due course of mail to my postoffice at Tombstone. The envelope purporting to have a stamp dated on it June 7, 1912, with the stamp cancelled, the address being Mr. George R. Albert, Box 1648, Tombstone, Arizona, came in due course of mail to my postoffice. It appeared to contain sealed information. I think my clerk made a notation on the back and enclosed it in a sealed envelope to the inspector from whom we received our instructions. The handwriting on the back part of that envelope is that of the clerk I had at the time. The envelope [44] upon which appears the stamp June 12, 1912, addressed to the same party, has a notation on it by the same clerk, W. A. Harwood, Jr. The envelope marked June 24, 1912, came to my postoffice in the ordinary course of mail. The envelope itself with the contents was mailed to the inspector in the regular course. The notation on the back of this envelope is in my own handwriting. The envelope bearing the stamp July 4, 1912, to the same person, passed through my office, and that is my own handwriting. That appeared to contain sealed matter. I can say the same with reference to the one dated July 15, 1912. The handwriting on the back of that is my clerk's. Owing to my official position, I know it passed through there. The one dated July 24, 1915, regularly passed through the office; also the

(Testimony of F. D. Crable.)

one bearing date August 20, 1912. That is my own handwriting. The one bearing date August 30, 1912, the same is true of that, and that is my handwriting. One dated June 13, 1913, that in due course of mail passed through my postoffice, and was forwarded by me with its contents, if it had any, to the postal inspector George A. Leonard. From the memoranda here, I can state that I mailed in due course letters to Dr. Jordan, 986 Market Street, San Francisco, California. Those I received from the postal inspector and forwarded in due course of mail. The stamps were cancelled on them the same as any other letter. There were several such letters. I did not keep track of how many. I can say there were more than two letters received. Whatever letters were received by me in due course of mail were forwarded as I have stated.

(Letter marked for identification Exhibit "C.")

#### Cross-examination.

I was probably in the office when the clerks who were working for me sent the mail. Some of the letters I sent and my clerks also sent some. I have no personal knowledge as to those the clerks [45] sent. Those that have my initials on I put on the back.

#### **Testimony of F. W. France, for Plaintiff.**

F. W. FRANCE, called as a witness on behalf of the United States, after being duly sworn, testified as follows:

My name is F. W. France. In 1912 and 1913 I was postmaster at Buckley, Washington, and as such

(Testimony of F. W. France.)

postmaster received certain envelopes purporting to contain sealed matter for the purpose of mailing. I received a number of letters from Inspector Honvery, and I do not know as I could tell the names and addresses, by which I can refresh my memory as to the forwarding of such letters. I could not say when a letter was received, but this one was forwarded October 12th, 1912, to Dr. Jordan, 986 Market Street, San Francisco, California. There is a registered letter addressed to Paul Allen at San Francisco. No address given, sent November 4, 1912. Mail came to my postoffice purporting to be mail from San Francisco addressed to a man named Anson Ashford. I forwarded such mail under cover to Postal Inspector Honvery at Washington, D. C. It appeared to have come through the mail in regular course and had a cancelled stamp on it, and was postmarked.

Q. I show you here a package of envelopes, one dated October 15, 1912, and one dated October 25, 1912, and a return card for registered letter under date of November 17, 1912, also an envelope dated November 18, 1912, also an envelope dated November 18, 1912, December 13, 1912, December 14, 1912, one January 6, 1913, one of June 13, 1913, and ask you whether or not those envelopes came in due course of mail to your postoffice and were by you forwarded to the postal inspector in charge?

A. They did and were.

(Document offered marked Exhibit "D" for Identification.) [46]



**Testimony of George E. McMurray, for Plaintiff,  
(Recalled).**

GEORGE E. McMURRAY, recalled on behalf of the United States, testified as follows:

This package you now show me came in due course of mail to my postoffice and was forwarded by me to the Post Office Department, just as it is now. It was not opened. I had no anxiety to open and read it. I am sure I did not do it.

**Testimony of W. L. Leonard, for Plaintiff.**

W. L. LEONARD, called as a witness on behalf of the United States, after being duly sworn, testified as follows:

My name is W. L. Leonard. I was postmaster at Oroville, Butte County, California, in 1912 and 1913. As such postmaster, I received instructions about mailing certain envelopes to one Dr. Jordan at San Francisco, and received envelopes for the purpose of mailing. I did mail them. I received instructions in regard to forwarding the mail of John Caroway that came there. I forwarded such mail to the Inspector at Washington. I did not know what that gentleman was suffering from.

Q. Look through this folder of correspondence and tell us how many letters you mailed to Dr. Jordan?

A. Here is one—there was one received from the postal inspector in charge of my office on June 29, 1912, addressed to Dr. Jordan, 986 Market Street, San Francisco. I postmarked the letter on that



(Testimony of W. L. Leonard.)

date and placed it in the mail at that particular time—cancelled the stamp on it and postmarked it. I put it in the mail complete, just as it was sent. There was a letter received back, postmarked San Francisco, in the regular course of mail, received at my office, addressed to John Caroway. I took that letter and marked it so that I could identify it again at any time, and forwarded it under cover to the postoffice Inspector at Washington. I received the first letter of that kind in my office July 2d, and forwarded it to Washington on the same day. That is the envelope. What it had in it I do not [47] know. It was sealed up. I received another one July 15th. This was a registered letter and was addressed to Mr. Paul Allen, care of Dr. Jordan, 986 Market Street, San Francisco, California; it was received at my office on July 15th, and mailed by me personally by registered mail on that date, and placed in the mail that same day. There is another one to Allen, care of Dr. Jordan, 986 Market Street, San Francisco, California, marked July 14, 1912, and that was also postmarked by me and placed in the mail in person. This little slip is a registry slip for this other letter that was registered by me and personally placed by me in the mail on July 15, 1912. This is a letter that I received in reference to this letter, which I registered here; the notations were made by me at that time on that.

This letter was received at my office addressed to John Caroway, mailed at San Francisco, July 26, 1912, received at my office July 27th, and personally

(Testimony of W. L. Leonard.)

handled by me, enclosed in a sealed envelope and sent to the postal inspector in Washington.

On August 7th, there was a letter addressed to Mr. Paul Allen, 986 Market Street, San Francisco, Cal., received in my office August 9th, and mailed on that same date to the place indicated on this sheet, addressed to Paul Allen, 986 Market Street, San Francisco, Cal. Subsequently a letter was received at my office on July 12th, personally handled by me, addressed to John Caroway, Box 451, Oroville, Cal., and that letter, when received by me, was by me in turn placed under cover and sent to the postoffice inspector at Washington. The same thing is true of a letter dated July 16th, received July 17th, at my office; also this return registry receipt, which was received back from the registered letter which was sent out signed by Paul Allen, and that in turn was sent to the postoffice inspector at Washington by me. [48]

Here is another letter to the same party and handled in the same manner. This letter was dated August 8th, and received August 9th, and forwarded to Washington on the same date under cover. This letter dated August 5th, out of San Francisco, came to my office on the 6th and was treated in the same manner, sent under cover to the postoffice inspector at Washington. The same way with a letter addressed San Francisco, dated August 10, 1912, and received at my office on the 12th. When I say dated I mean postmarked on the outside of the envelope.

John Caroway, Box 451, dated San Francisco,

(Testimony of W. L. Leonard.)

August 21st, received at my office August 22d, and sealed and mailed to the postoffice inspector in Washington. Another letter addressed John Caroway, Box 451, Oroville, Cal., postmarked September 3d, received in my office September 4th, and by me personally sent to the postal inspector at Washington.

Another to John Caroway, Box 451, from San Francisco, September 12th, marked by me personally the following day, and sent by me to the postal inspector in Washington. Also this one dated September 21st, 1912—each one of these is marked personally by me and I sent them under cover—another to John Caroway, Box 451, Oroville, Cal., dated October 12, 1912, dated at my office on the 13th; and sent under cover to the postal inspector at Washington.

Another to John Caroway, dated October 4th, and received at my office the following day, and sent by me under cover to the postal inspector at Washington. Another to John Caroway, dated June 12, 1913. I received something at one time that I believed to be a little paper book. Possibly it might have been medicine, I would not say, I do not think that I forgot to mail that.

**Testimony of G. A. Leonard, for Plaintiff.**

G. A. LEONARD, called as a witness on behalf of the United States, after being duly sworn, testified as follows:

My name is [49] G. A. Leonard. I am postal inspector in charge of San Francisco and have been

(Testimony of G. A. Leonard.)

since August, 1913. Just prior to that I was in Washington, D. C., as an inspector. I am the G. A. Leonard referred to as having conducted certain correspondence with the postmasters whom you have seen on the stand here.

The first letter in the trial of papers known as Government's Exhibit "A" is a carbon copy of a letter which I wrote on May 27th, 1912. I placed this in an envelope addressed to Dr. Jordan, 986 Market Street, San Francisco, and forwarded it to the postmaster at Colusa, California, for mailing. The substance of the letter is as follows:

**Government's Exhibit "A"—Letter Dated May 27, 1912, from John Bammer to Dr. Jordan.**

"Dear Doctor:—I have seen your advertisement, and am writing to you to know if you have any medicine that will restore my lost power now that I am eighty years old. *Yours* truly, John Bammer, Box 800."

I have seen some of Dr. Jordan's advertisements of that kind. I do not know anything personally about the notations on these advertisements. I sent that letter to that postmaster with instructions to mail it to the address there given. It was placed in an envelope, sealed, and stamped, and the envelope was addressed to Dr. Jordan, 986 Market Street, San Francisco. This envelope was placed inside of another envelope and sent to the postmaster at Colusa, California, accompanied with certain instructions concerning the mailing. I got replies to that letter. I received them through the mail from



(Testimony of G. A. Leonard.)

the postmaster at Colusa, California, in an official envelope. It covered a letter mailed at San Francisco, California, May 27, 1912, at 6 P. M., addressed "Mr. John Bammer, Box 800, Colusa, Cal." I received that letter at Washington, D. C., on the 8th of June, 1912. It was a sealed letter, and that is the envelope in which I received it.

Q. Read it.

Mr. FAIRALL.—We object to the reading of the contents of that [50] letter, until it has been shown that the defendant was in some way connected with the writing of it.

The COURT.—The objection will be overruled.

Mr. FAIRALL.—Exception.

A. It is on the letter-head, "Office of Dr. L. J. Jordan, 986 Market Street, opposite Sixth; hours 9 A. M. to 5 P. M. and 7 to 9 P. M.; Sundays 10 to 12 A. M. Private address: Paul Allen, 986 Market Street, Jordan's Museum of Anatomy. Established Fifty Years. Diseases of Men.

San Francisco, Cal., May 27, 1912.

Mr. John Bammer,

Box 800, Colusa, California.

Dear Sir and Friend:

I have your letter and note what you say. However, it would be impossible for me to give you any definite information without further information regarding your condition, and enclose herewith a question blank for you to fill out and return; also treat and return the litmus papers as per the directions on the small envelope that contain them. Then



(Testimony of G. A. Leonard.)

write in your letter a full history of your case, since the beginning. Give me all the information you can.

Awaiting your early reply, I remain,

Yours very sincerely,

L. J. JORDAN.

Dict. X.”

Mr. FAIRALL.—We move to strike out the letter on the ground that it is immaterial, irrelevant and incompetent; on the further ground that it is hearsay and has in no way been connected with the defendant in this case or with the Jordan Museum, or with Dr. Jordan or any party connected with the case.

The COURT.—The motion is denied.

Mr. FAIRALL.—Exception.

A. A letter dated San Francisco, Cal., June 7, 1912, 7:30 P. M. Addressed “Mr. John Bammer, Box 800, Colusa, Cal.,” which was [51] received by me at Washington, D. C., June 18, 1912.

Mr. FAIRALL.—Same objection.

The COURT.—Same ruling.

Mr. FAIRALL.—Exception.

A. It is headed the same way as the other:

“San Francisco, Cal., June 7, 1912.

“Mr. John Bammer,

Box 800, Colusa, Calif.

Dear Sir:—

Sometime since on your request I mailed you a copy of my book ‘The Philosophy of Marriage,’ which I trust you have received and read with care.

“I presume you are suffering from some ailment

you do not understand and from which you desire relief. A knowledge of sexual hygiene, self and sex and their relation to life and health, diseases of life-giving organs, vicious practices and their results and sequelae do not come intelligently of themselves, nor correctly from ordinary every-day sources, nor by the advice of ignorant friends.

“False modesty no doubt prevents you consulting one who has given his entire professional life in guiding thousands along the road to health, happiness and success. I want your confidence, as others have given it during all of my professional career.

“I am sure you wish to make a name for yourself; you do not want to be a failure before your time. You wish vigor and stamina in order to overcome the difficulties you meet in the battle for existence. To do this you must not be handicapped by weak organs. You must be strong in the loins and gird them up, as directed in the Good Book. No chain is stronger than its weakest link. Ships in storms are at the mercy of the weakest bolt.

“Self-pity and the demon of discontent, the weight that holds thousands back, is caused by ill health of one or more of the vital functions. [52]

“No matter who you are, no matter how much money you have, no matter if you are able to pay cash, no matter if you must have terms, no matter what the conditions, you cannot afford to neglect yourself. Self preservation is the first law of nature. This relates to your health, as well as fighting

(Testimony of G. A. Leonard.)

to defend your life, or the life and health of your offspring.

“Therefore return my blank with the questions all answered. Do not allow a secretive nature, engendered by this condition and a symptom of it, to delay and prevent you obtaining a complete cure.

“Do not allow money matters to interfere. I assure you that all charges will be reasonable and within your means. We have never worked a hardship on anyone. Answer immediately.

Very truly yours,

Dr. T. J. JORDAN.

Dict. by T. B.”

Mr. FAIRALL.—The same motion.

The COURT.—The same ruling.

Mr. FAIRALL.—Exception.

A. Another letter mailed at San Francisco, Cal., June 18, 1912, at 6 P. M., addressed “Mr. John Bammer, Box 800, Colusa, Cal.,” as follows:

“Mr. John Bammer,  
Colusa, Calif.

Dear Sir:

Having received no reply to my letters in answer to your communication some time ago, and thinking it possible that they may have gone astray, or may have been incorrectly addressed to you, I write to ask, if you receive this letter, that you will pardon the apparent delay, and will at once give the matter of your treatment proper and prompt attention so that further complications may not have an opportunity to arise and cause you more trouble.

"I cannot understand how it is that you are content to let your case run on as it has and sacrifice your health for life, when, if you will only stop and consider for a few minutes that at this [53] particular time, a restoration to perfect health and sexual strength can be affected within a short time; and I assure you that, if you will give yourself the proper attention, you will never regret doing so; but, if you do not take my advice, you will come to grief later on, believe me.

"My treatment is perfectly harmless, rest assured, and the long term of years over which my practice has extended, with the careful study of hundreds of cases that I have cured, has gained for me a reputation as a skillful and successful specialist.

"Trusting that I will hear from you on receipt of this letter and that you will get started after your case in earnest, I am,

Yours friend,

Dr. L. J. JORDAN.

Dict. by S. N."

On June 25, 1912, I mailed the symptoms blank referred to in the letters I have read, as follows:

"Questions to be Answered in Cases of Spermatorrhea, Impotency and Sexual Debility.

Name, John Bammer; Postoffice, Colusa, Cal. Express office? Colusa, Cal.

How long have you lived in your present location?

A. 10 yr.

Does the climate agree with you? Yes.

Age? 80. Weight? 170. Height? 5-10.

Color of Hair? White. Color of eyes? Blue.

Are you married? Yes.

If so, for how long? A. 50 years.

Your nationality? American.

Your occupation? Retired.

How long have you been so employed? 10 yrs.

Does your work fatigue you? Don't work much.

Are you confined indoors? No.

Do you dissipate in any way? No.

What has been the cause of your complaint? Old age. [54]

How often do you have sexual intercourse? None.

Is sexual intercourse satisfactory in every way?

Can't do it.

Are the seminal discharged (during sexual intercourse) too quick or too slow? Can't do it.

Do you lose semen in your urine? No.

Do you lose semen during movement of bowels? No.

Do you have emissions of semen at night with or without dreams? No.

Does the semen ever pass from you during the day when you have amorous thoughts or when in company of women? No.

Are you attended by erections?

Are the erections weak? No erections.

Is there any loss of sexual desire or power? Yes.

Have your privates wasted or become small? Yes.

Is the prepuce (foreskin) long? Yes.

Have you any Varicocele (a knotted condition of the



(Testimony of G. A. Leonard.)

veins in the scrotum or bag)? No.

Are the erections strong? No erections.

Does the scrotum hang low? No.

Is there stricture (obstruction) in the water passage? No.

How often do you urinate? 5 or 6 times a day.

What is the appearance of the urine? Light yellow.

Is its passage painful? No.

What is the condition of your stomach? Good.

What is the condition of your bowels? All right.

Are you troubled with piles or pinworms? No.

Is there any inflammation or soreness of the rectum?  
No.

Are you ruptured,—if so, describe same, and do you wear a truss? No.

Are you restless and wakeful at night? No.

Have you ever had gonorrhea (clap)? No.

Have you ever had gleet (gonorrhea over three months)? No. [55]

Have you ever been under treatment? No.

If so, by whom and how long?

Could you call, if necessary? No.”

I have not the original symptom blank. I read a copy. The original was sent. I have a carbon copy of the original by numbers, and also an exact copy of the blank which was sent. It came as a printed blank in general form. It was not made out specially for my case. With that symptom blank, I sent two little strips of litmus paper which had been furnished by the L. J. Jordan Company, and the directions were to dip the litmus paper in the urine;

(Testimony of G. A. Leonard.)

the litmus paper I sent was dipped in water taken from a bottle we had in the room; it was a bottle of drinking water. In that water we placed ten drops of lemon juice, in a part of a glass of water, and dipped the litmus paper in that. I was not trying to produce an acid condition there. I dipped the litmus paper in the water to which had been added some lemon juice. Nobody told me to put in lemon juice. I did not know that would make an acid condition. I presume I knew that lemon juice is acid.

I next received a letter mailed in San Francisco, California, July 2, 1912, 7:30 P. M., addressed to Mr. John Bammer, Box 800, Colusa, Cal.

Mr. FAIRALL.—Under the same objection?

The COURT.—Yes.

A. “Mr. John Bammer, Box 800, Colusa, Cal.

Dear Sir and Friend”:

(This is on the same letter-head.)

“I have your return of the question blank and test papers. You should have written me by letter also—giving me any further information you deem necessary that I should know. From the data you sent me it is my judgment that you have an excess of amorphous-urates and phosphates, indicating wasted energy, and anemia neurasthenia, at the expense of some of the functions of the body. [56] You require and demand treatment to place you on a par with your fellow-men. You will find the testicles are weak and flabby and not manufacturing healthy spermatozoa. There is no evidence of Bright’s Disease, or proof of Diabetes, altho an

overworked kidney may lead to both. You will find mucous strings flocculi or sediment in the urine indicating prostatic inflammation at the neck of the bladder, with the consequent loss of vitality and absence of complete sexual satisfaction required by all male animals of health.

“Your case is a complicated one requiring careful and scientific treatment on the part of any physician who treats you. If you give your case into my hands I must have honest co-operation on your part, following to the letter my instructions, which are perfectly simple.

“I don’t profess to say that your case is an easy one to handle. But you can secure very material assistance. My treatment will create new blood, new muscle and new secretions, promote circulation, build up and maintain new nerve cells and fibres. The weakened and rundown system will be built up and invigorated, and injected with spirit and life—such as should be found in every man who cares to give the proper attention to his health and the maintenance of his vigor and manhood power. I will take your case and furnish the medicines required for \$10.00 a month. This is fair method of payment to you, although I do not know your financial circumstances. You need not hesitate to write me fully, as everything is kept confidential. All medicines are sent out in plain packages, and no one knows from whom they come.

“I would like your reply by return mail whether you wish to take up the treatment or not. By writ-

(Testimony of G. A. Leonard.)

ing me your intentions, I will know what to do about further correspondence. I do not like to write unnecessary letters to anyone, as they might go astray, [57] or fall into someone else's hands and cause you embarrassment; therefore, reply at once.

"If you could come down and see me—I would be glad to have you do so. Please let me know if you can come, and at what time. I would like to talk with you, as things can be explained better by a personal interview than in a letter.

"With kind regards, and best wishes, and awaiting your early reply, I remain,

"Very sincerely yours,

"Dr. J. L. JORDAN.

Dict. X."

That is all that was done in connection with that case. I sent the litmus paper dipped in water, to which lemon juice had been added. This book here, a part of exhibit "A," was received by me in connection with another case, not this one.

This Government Exhibit "B" is a file of correspondence, containing carbon copies of letters which were sent to the Dr. Jordan Company, and letters which I received from the company. It is the same general character of correspondence that I have just read. The first is a carbon copy of a letter which I wrote on December 13, 1912, as follows:

**Government's Exhibit "B"—Letter Dated Cherry Creek, Nev., from J. P. Millspaugh to Dr. Jordân.**

"Cherry Creek, Nev.

Dr. Jordan:

Dear Doctor:

Please send me your book about 'Philosophy of marriage' and information about your cures of men.

Yours truly,

J. P. MILLSPAUGH,

General Delivery."

Next is a letter postmarked "San Francisco, Cal., Dec. 20, 1912, 7 P. M.," addressed to "Mr. J. P. Millspaugh, General Del., Cherry Creek, Nev.," and reads as follows: The same letter heading as in the case I just read.

"San Francisco, Cal., Dec. 20, 1912.

"Mr. J. P. Millspaugh, Gen. Del.,

Cherry Creek, Nev. [58]

Dear Sir:—

This is to acknowledge the receipt of your favor of recent date. I am mailing to you by this mail my book 'The Philosophy of Marriage,' under separate cover. Should it not arrive promptly, please notify me.

"This book will give to you valuable information on Sexual Hygiene, and the care of the functions that go to make the boy and man a success in his work, and above and beyond all, live a happy married life.

"All dominant magnetic men are sexually strong.



They are attractive and commanding to both sexes.

“My space here and in the book forbids a discussion of special or particular cases. I will be pleased to discuss your case, or give you any further information you may desire, in plain language, so that you will have a clear understanding. The same to any friends of yours you know to be making mistakes, if he will write me.

“I have touched on the practice known as Onanism (Self-abuse) because of its very great importance to men in all walks of life. It is a great factor in the success and happiness of man’s business and matrimonial career. It is a brain and nerve leak readily curable. If not cured and every trace of the injury done removed, no matter how late in life, disaster and failure are sure.

“Tell me your story in confidence. I will advise you true.

“The secret of success is nervous energy. The hustling spirit of enterprise is only an expression of that energy. Nothing is impossible to the man who has the strength to try for it. No man has the strength who allows vitality to constantly leak or waste away. The one is courageous and brave; the other is a coward.

“I call your attention to another important factor: the effect and cure of Gonorrhoea, Syphilis and other venereal diseases, both [59] remote and recent. Sometimes the entire life is changed by bad advice and by ignorant treatment by persons pretending to know, leaving results removable only by

(Testimony of G. A. Leonard.)

the expert specialist. All diseases of this nature are curable. Their effects on the stomach, kidneys, liver and nervous system are removable.

“Answer all the questions on the enclosed blank, then mail to me with the return of the two slips, after following directions printed on the envelope.

“Trusting to hear from you at an early date,

“Very truly yours,

“Dr. J. L. JORDAN.

“P. S.—Inclosed chemical test papers take the place of the bottle of urine called for in question blank.

Dic. by O. A.”

Another letter postmarked San Francisco, January 2, 1913, at 7 P. M., addressed to Mr. J. P. Millspaugh, General Delivery, Cherry Creek, Nevada, as follows:

“San Francisco, Cal., Dec. 30, 1912.

Mr. J. P. Millspaugh,

Cherry Creek, Nev.

Dear Sir:—

Sometime since on your request I mailed you a copy of my book ‘The Philosophy of Marriage,’ which I trust you have received and read with care.

“I presume you are suffering from some ailment you do not understand and from which you desire relief. A knowledge of sexual hygiene self and sex and their relation to life and health, diseases of life-giving organs, vicious practices and their results and sequelae do not come intelligently of themselves, nor

correctly from ordinary every-day sources, nor by the advice of ignorant friends.

False modesty no doubt prevents you consulting one who has given his entire professional life in guiding thousands along [60] the road to health, happiness and success. I want your confidence, as others have given it during all of my professional career.

“I am sure you wish to make a name for yourself; you do not want to be a failure before your time. You wish vigor and stamina for existence. To do this you must not be handicapped by weak organs. You must be strong in the loins and gird them up, as directed in the Good Book. No chain is stronger than its weakest link. Ships in storms are at the mercy of the weakest bolt.

“Self pity and the demon of discontent, the weight that holds thousands back, is caused by ill health of one or more of the vital functions.

“No matter who you are, no matter how much money you have, no matter *is* you are able to pay cash, no matter if you must have terms, no matter what the conditions, you cannot afford to neglect yourself. Self preservation is the first law of nature. This relates to your health, as well as fighting to defend *you* life, or the life and health of your offspring.

“Therefore return my blank with the questions all answered. Do not allow a secretive nature, engendered by this condition and a symptom of it, to delay and prevent you obtaining a complete cure.

(Testimony of G. A. Leonard.)

“Do not allow money matters to interfere. I assure you that all charges will be reasonable and within your means. We have never worked a hardship on anyone. Answer immediately.

“Very truly yours,

“Dr. L. J. JORDAN.

“Dict. by T. B.”

Under date of January 3d, 1913, I filled out a symptom blank and I have here a carbon copy of it. The heading is:

“Be sure and put your name on your *same* of Urine. Express or Postage must be Prepaid on same.”

DR. JORDAN,  
SPECIAL QUESTION BLANK AND DIAG-  
NOSIS SHEET. [61]

“I wish to impress upon you the importance of answering in detail the following questions, regardless of your opinion as to whether or not they are of importance, because information which may seem irrelevant and unnecessary to you may be of great weight in enabling me to make a thorough diagnosis in your case, and consequently enable me to render you satisfactory service.

“And to further assist me in making a correct diagnosis, in your particular condition, it is absolutely necessary to make a careful and microscopical analysis of your urine.

“Therefore, kindly send me a small bottle of your urine (well packed) either by mail or express, pre-paid. As this urinary analysis necessitates some

(Testimony of G. A. Leonard.)

expense and labor I make the nominal charge of \$2.50 to cover same, and would ask you to kindly remit this amount with the urine.

“When sending sample of urine be sure and have your name or some mark of identification on the package, so I may know who sent it. I received a great many samples of urine daily, and I must know from whom they come, otherwise they are given no attention.

“Dr. Jordan has the most complete set of instruments and the most powerful microscope, with which to conduct these investigations, that there is on the Pacific Coast.

“I must know and you must know, just what these conditions are. Why? I must know to determine the course of treatment. You, to settle the question every intelligent patient always asks himself every time he urinates, “Does my seed pass in my urine?” Now, this is the best and proper way to proceed to ascertain a cure for your troublesome disease. Don’t delay and say, ‘I will wait until some other time.’ Delays are always dangerous. Proceed at once to relieve yourself of one of the greatest *cures* of mankind.

“Therefore answer each and every one of the following questions conscientiously, to the best of your knowledge.” [62]

This symptom blank, which was contained in the first letter, accompanied the letter of December 20th. My first letter was simply a request for a book on marriage. He enclosed his symptom blank. The



last paragraph of his letter is as follows:

“Answer all the questions on the enclosed blank and mail to me with the return of the two slips, after following directions printed on the envelope.

“A. Questions to be answered in cases of Spermatorrhoea, Impotency and Sexual Debility.

1. Name? J. P. Millspaugh.
2. Postoffice? Cherry Creek, Nev.
3. Express office?
4. How long have you lived in your present location? 5 years.
5. Does the climate agree with you? Yes.
6. Age? 54. Weight? 181. Height? 5 ft. 11.
7. Color of Hair? Gray. Color of Eyes? Blue.
8. Are you married? Yes.
9. If so, for how long? 30 years.
10. Your nationality? American.
11. Your occupations? Carpenter.
12. How long have you been so employed? All my life.
13. Does your work fatigue you? No.
14. Are you confined indoors? No.
15. Do you dissipate in any way? No.
16. What has been the cause of your complaint?  
I don't know.
17. How often do you have sexual intercourse?  
About 1 a month.
18. Is sexual intercourse satisfactory in every way? Yes, when I have it.
19. Are the seminal discharges (during sexual intercourse) too quick or too slow? No. [63]

20. Do you lose semen in your urine? I don't know.
21. Do you lose semen during movement of bowels? I don't think so.
22. Do you have emissions of semen at night with or without dreams? No.
23. Does the semen ever pass from you during the day when you have amorous thought or when in company of women? No.
24. Are you attended by erections?
25. Are the erections weak?
26. Is there any loss of sexual desire or power? Yes.
27. Have your privates wasted or become small? No.
28. Is the prepuce (foreskin) long? No.
29. Have you any Varicocele (a knotted condition of the veins in the scrotum or bag? No.
- 29½. Are erections strong? Yes.
30. Is there any stricture (obstruction) in the water passage? No.
31. How often do you urinate? About 4 times a day.
32. What is the appearance of the urine? Light red.
33. Is its passage painful? No.
34. What is the condition of your stomach? All right.
35. What is the condition of your bowels? Good.
36. Are you troubled with piles or pinworms? No.

(Testimony of G. A. Leonard.)

37. Is there any inflammation or soreness of the rectum? No.
38. Are you ruptured, if so, describe same, and do you wear a truss? No.
40. Are you restless and wakeful at night? No.
41. Have you ever had gonorrhoea (clap)? No.
42. Have you ever had gleet (gonorrhoea over three months)? No.
43. Have you ever been under treatment? No.
44. If so, by whom and how long? No.
45. Could you call, if necessary? No.”

On the reverse side of the sheet are questions which were not [64] answered, but on this side I made the following written notation:

“Dear Doctor: I am afraid that I may be losing semen in my urine because I don’t have so much desire for intercourse as I used to have. Now I am sending you papers and I hope you can tell me about it.”

The litmus papers which were returned with the symptom blank were soaked in a solution of tea to which had been added a little salt, a little library paste and a few drops of ammonia. It changed the color of the pink paper slightly. Here are some papers that were dipped in the same solution, the same kind of papers that were dipped in the same solution; this is an envelope which was forwarded to me with the symptom blank, and the same kind of an envelope with the same kind of papers were returned to the doctor with the blank. On the outside of the blank is ‘Inclosed you will find chemical test

(Testimony of G. A. Leonard.)

papers. Directions: Dip these strips into the urine passed in the morning. Then dry them and return them to me in this envelope, together with all questions answered on the Question Blank."

A letter at San Francisco, January 10, 1913 at 6 P. M., addressed to J. P. Millspaugh, Cherry Creek, Nevada, as follows:

"Mr. J. P. Millspaugh,  
Cherry Creek, Nevada.

Dear Sir:—

I have your symptom blank and the urine test slips. I note carefully the information you desire, but am sorry to advise that I cannot make the analysis I would deem necessary from the test slips. Owing to the recent cold weather, it seems that same has so affected the test slips that a thorough analysis cannot be made, and I would not wish to advise you one way or the other unless I was certain of my ground. So I will ask that you send me a sample of your urine carefully wrapped by mail or express in a bottle. Four ounces will be enough for an analysis. Always send the first urine you pass in the morning after arising. It would indicate from your question blank that your surmise is correct from the lack of desire you now have that your system is not in the condition it should be to enjoy pleasures that are rightfully yours to the full [65] extent that you should. With the bottle of urine, kindly remit me \$2.50 to show your good faith, and cover cost, time and expense analysis. As I have to make a number of analyses every day, I cannot afford the time and

(Testimony of G. A. Leonard.)

expense unless the person is sincere and intends to take the treatment; therefore I ask for this deposit. However, if you start treating with me, I will credit this \$2.50 in your fee so that you will lose nothing. Please send me the sample of urine at once, so I can analyze same and report to you at an early date. Awaiting same and assuring you of my best care and attention at all times if you place your case in my hands, I remain,

Very sincerely yours,

Dr. L. J. JORDAN."

Here is a letter that was sent out of order; preceding that, was a mailed letter dated January 9, 1913, addressed to Mr. J. P. Millspaugh, General Delivery, Cherry Creek, Nevada, as follows:

"Mr. J. P. Millspaugh,

Cherry Creek, Nevada.

Dear sir:—

With the opening of my new Museum since the fire, I have instituted several new Departments. One of them you will be interested in.

Every man at times feels himself below par—not up to the standard in his mental, physical and sexual life. This condition is largely due to what we, for want of a better term, call 'Vital Leaks' that is, there is vitality wasted, which if retained and made use of would place you all to the good—more successful in business, more agreeable to your friends and more attractive to the opposite sex.

"The intense competition in all human endeavor



calls for live men, 'dead ones' and incompetents Oslerized.

"The secret of success is nervous energy, nerve force properly applied—nothing impossible to the man who has the strength to try for it. He wins.

"If you are unconsciously wasting this energy, you are handicapped [66] in all that goes to make life worth the living. Opportunity knocks at your door every morning; you are not at home.

"You go into the battle each morning with 100 units of strength, at night you have expended all the 100, you are all in and will fall below par. You fight a losing battle.

"If you were in such a condition, physically and mentally, as to begin the day with 150 units and use only 75, you would then realise what it means when we say, 'The battle belongs to the strong.' 'The race to the swift.' 'The fittest are chosen and alone survive.'

"My laboratory I have builded along scientific lines. I am prepared to measure and judge leaks—wasted vitality, sexual neurasthenia—through an examination of the urine and a series of questions honestly answered. I will be able to give you an honest diagnosis and direct you proper and true.

"Follow instructions with the inclosed slips, chemical test papers, return with Post Office Money or Express Order for two dollars and fifty cents to cover the expense, answer all the questions on the

(Testimony of G. A. Leonard.)

blank honestly. You will then be advised of the result.

Yours very truly,

Dr. L. J. JORDAN.

Chemical & Microscopical Department.

3 B. P. S.—Enclosed chemical test papers take the place of the bottle of urine called for in question blank.”

Under date of January 19, 1913, mailed at San Francisco on the 21st, is a letter dated January 19, 1913, addressed to Mr. J. P. Millspaugh,

Cherry Creek, Nevada.

“Dear Sir:—

How are you coming along? I am anxious to begin treatment in your case. Delay always makes it more difficult of cure. The principal object of your life today should be to become a well and strong man, able to cope with all the situations you [67] meet. The intense competition of life, both in love and business, is such that success comes only to those who fit themselves for and are able to stand the strain.

“The battle belongs to the strong. The race to the swift. The fittest is chosen and alone survives. The strength of all chains is measured by their weakest link. No man is stronger than his weakest organ. That organ is not strong that leaks and wastes vitality placed there by the economy of Nature for a definite purpose.

“Waste not thy seed on the stones by the wayside.

(Testimony of G. A. Leonard.)

“I can and will make you well and strong. I will repair the damage done by your own mistakes.

“If you wish to make a man of yourself, I will help you. The knowledge to do this does not come of itself, nor from ignorant friends. You have only the experience of yourself; I have the experience of thousands—saved and guided into the right road.

“Now tell me where the delay is and why you do not respond. I want to help you. If money is the cause, be frank and tell me. I may suggest a way within your means. Tell me all about it, the *curse* first and above all things.

Yours very truly,

Dr. L. J. JORDAN.”

2 AA.

That was after I had sent the blank and after he had requested the bottle of urine in place of the chemical test paper. A letter dated February 1, 1913, San Francisco, Cal., mailed the same date, is as follows:

“Mr. J. P. Millspaugh,  
Cherry Creek, Nevada.

“Dear Sir:—

Having received no reply to my letters in answer to your communication some time ago, and thinking it possible that they may have gone astray, or may have been incorrectly addressed to you, I write to ask, if you receive this letter, that you will pardon [68] the apparent delay, and will at once give the matter of your treatment proper and prompt attention so

(Testimony of G. A. Leonard.)

that further complications may not have an opportunity to arise and cause you more trouble.

“I cannot understand how it is that you are content to let your case run on as it has and sacrifice your health for life, when, if you will only stop and consider for a few minutes that at this particular time, a restoration to perfect health and sexual strength can be affected within a short time; and I assure you that, if you will give yourself the proper attention, you will never regret doing so; but, if you do not take my advice, you will come to grief later on, believe me.

“My treatment is perfectly harmless, rest assured, and the long term of years over which my practice has extended, with the careful study of hundreds of cases that I have cured, has gained for me a reputation as a skillful and successful specialist.

“Trusting that I will hear from you on receipt of this letter and that you will get started after your case in earnest, I am,

Your friend,

Dr. L. J. JORDAN.

Dic. by S. N.”

The next letter, mailed at San Francisco, Cal., February 10, 1913, at 6 P. M. is as follows:

“Mr. J. P. Millspaugh,  
Cherry Creek, Nev.

Dear sir:—

I hope your manliness and desire for fair play will result in a reply to this letter. Of course, I don't

want to take up your time with unnecessary correspondence. Do you want treatment? If so, I will be glad to take your case if you are sincere and earnest about it. I won't take it unless I can benefit you, and I don't want it unless you are sincere and unless, if you start you will give me your co-operation. Why the delay? Is it account lack of funds? No matter what the reason, I am willing to help you in any way, manner or shape that you desire. If you are hesitating account of lack of funds, I will say for your [69] information that you can pay me as you like, in monthly payments, or in advance. The main thing and most important is to relieve your condition. That comes before the cost. The constant loss and drainage of vital fluid from one's system is bound to sap his vitality and strength—and he naturally loses desire, and loses power to carry out his family duties in a satisfactory manner. It is just the same as undermining a house, or wall in a mine. Constant sapping or taking away supports, allows the whole thing to topple in an instant. So it is with the human system. Take its strength and support, and it crashes down. Now, Mr. Millspaugh, I think you will admit I have been fair with you. If you don't desire, or will not take up treatment, I make a direct appeal to your sense of honor and fairmindedness to write me a few lines stating so. If you do wish treatment, send me a bottle of the first urine you pass in the morning and I will analyze and report conditions, cost, etc., I



(Testimony of G. A. Leonard.)

will also credit this \$2.50 towards your fee if you start. Please don't carelessly overlook answering this letter. I thank you for your prompt attention to it.

Respectfully,

Dr. J. L. JORDAN."

Under date of February 18, 1913, I wrote Dr. Jordan a letter of which this is a carbon copy:

"Cherry Creek, Nev.

Dr. Jordan:

I have received your letter telling me that the cold weather spoiled the test papers so you couldn't make a test and wanting me to send a bottle of urine. You remember me doctor that you sent me 2 different pieces of test paper so I am sending the other one to you now, am sorry the other one didn't work for I am anxious to begin taking the treatment if you find I need it. I would send the urine *to* if I had some kind of a case to send it in. I remember now it was an awful cold day that I sent the other paper and I was outdoors a long time before I took it to the postoffice. [70] Now I do hope this paper will be all right and that you will let me hear all about what you find is the trouble with me.

Yours truly,

J. P. Millspaugh,

General Delivery."

The litmus paper, the second I sent, was soaked in a solution of tea, to which was added some salt, ammonia and a little library paste.

(Testimony of G. A. Leonard.)

Under date of February 25th, a letter mailed at San Francisco, California, the same date:

“Mr. J. P. Millspaugh,  
Cherry Creek, Nevada.

“Dear Sir:—

This is in reply to yours of recent date. The chemical test papers and question blank were carefully and scientifically considered.”

Q. Did you send this man any purported urine?

A. No, I sent no urine, but the second litmus paper.

Q. Dipped in the same stuff as the first?

A. Yes.

“From this data it is my judgment that you have an excess of amorphous urates and phosphates, indicating wasted energy, anemia neurasthenia at the expense of some of the functions of the body. You require and demand treatment to place you on par with your fellow men.

“You will find the testicles are weak and flabby and are not manufacturing healthy spermatozoa. There is no evidence of Bright’s Disease or proof of Diabetes, although an overworked kidney may lead to both. You will find mucous strings flocculi or sediment in the urine indicating prostatic inflammation at the neck of the bladder, with the consequent loss of vitality and absence of complete sexual satisfaction absolutely required by all male animals of health.

“Your case is a complicated one requiring careful and scientific treatment on the part of any physician who takes upon himself the responsibility of treating you. If you give your [71] case into my hands I must have honest co-operation on your part, following to the letter my instructions.

“I will take your case and furnish all medicines required in the course of treatment for \$47.50 cash, or, if you wish to pay on time \$17.50 down and \$10.00 monthly; time required, about three or four months. If you accept either of these propositions, which are very liberal, kindly remit the amount with which to start in, and continue to do so until cured. Sexual neurasthenia results from the violation of the laws of health so impairing the system that it ceases to perform its functions.

“The victim is awakened by dreams, the result of this disturbance; this is continued, usually occurring at shorter intervals often accompanied by erotic dreams, until the organ becomes incapable of performing its function, producing a long line of reflex irritations and complications.

“You cannot afford to lose your stamina or to be a failure in life. Low spirits never bother the healthy. No one can be happy or successful unless well. There is latent power in every one—all it wants is to be awakened and cared for.

“Excepting an early reply, I am,

“Yours very truly,

“Dr. L. J. JORDAN,

Dict. by F. L.”

(Testimony of G. A. Leonard.)

The next letter is dated San Francisco, Cal., March 7, 1913.

“Mr. J. P. Millspaugh,  
Cherry Creek, Nevada.

Dear Mr. Millspaugh:

It was my hope that you would be on my treatment list before this time. You know, and I know, that a condition such as yours, specially at your age, cannot be neglected without resulting very badly to you. That is the result of a cure will be harder to attain, it will take longer, and it will cost you a great deal more. I do not believe that you are the sort of a man to hesitate over the small amount asked, when you [72] know that my half century of experience, study, knowledge and ability are behind your case, watching it closely and giving it every attention. It is the same with everything, he who hesitates loses out. Nothing is to be gained by delay. I am saying this to you because I know from my long experience that men are careless and unless they are encouraged by the physician, they let matters go from bad to worse. Now, Mr. Millspaugh, let us get together. Let us work shoulder to shoulder to get the benefits you want, and must have, to become vigorous and strong. I made you a fee of \$47.50 cash, or if you wish to pay by the month, send me \$17.50 for the first month's treatment and then \$10.00 a month after. Isn't this fair? Can you ask for any fairer terms? If you start at all, do it now. Don't put it off. I *have* sincerely inter-

(Testimony of G. A. Leonard.)

ested in relieving you and wish to demonstrate the faith I feel in bringing about the results you desire.

“Remember, I am expecting to have you on my treatment list at once, if in any way possible. I thank you for your early courtesy in replying.

“Very sincerely yours,

“Dr. L. J. JORDAN.”

The next letter is dated March 8, 1913, mailed at San Francisco, California, the same date.

(Letter considered read, offered in evidence, and marked “United States Exhibit 2.”)

I think that is the one I sent the urine with.

The same is true of this exhibit “C,” as of the others, in regard to the way I managed it and the letters I wrote.

(Package marked “United States Exhibit No. 3.”)

The first letter is dated

“Oroville, June 29, 1912. Box 451.

Dr. Jordan,

Dear Doctor:

I have seen your advertisement and I want to know what you can do to help a young man who is having night losses in his dreams at night. I don't know anything about what makes them but as they have occurred several times I have thought [73] best to write to you about them.

Yours truly,

JOHN CAROWAY.”

Following that up we get this letter:



“San Francisco, Cal., July 1, 1912.

“Mr. John Caroway,  
Oroville, Calif.

Dear Friend:—

I have your letter today and note what you say and the information you desire. I am mailing you today under separate cover a copy of my book *Philosophy of Marriage*, which I wish you would read over very carefully, as you will find information that may have some bearing on your case, the cause of same, etc. After you have read this book, then write me more fully about the history of your case since the beginning, and fill out and return the enclosed question blank. Also treat and return the chemical test papers so that I may analyze your urine. With this data, send a remittance of \$2.50, to show your good faith, and to cover expenses in analyzing the urine—then if you start treating with me, I will give you credit for this \$2.50, so in reality you will be out nothing. After I get this data, I can better diagnose your case and give you the information you desire. Write me freely and candidly; everything is kept strictly confidential.

It is evident from what you say that something is radically wrong with your system, and the generative organs. This should not be neglected. The book will explain the effect of neglecting this condition. I await your early reply, and you can be assured that

you will receive my very best individual attention.

Yours Sincerely,

Dr. L. J. JORDAN.

Dict. X."

The symptom blank is as follows:

"Name? John Caroway.

Postoffice? Oroville, Cal.

Express office? Do.

How long have you lived in your present location?

All my life.

Does the climate agree with you? Yes. [74]

Age? 20. Weight? 150. Height. 5 ft. 8 in.

Color of hair? Black. Color of eyes? Blue.

Are you married? No. If so, how long?

Your nationality? American.

Your occupation? None just now.

How long have you been so employed?

Does your work fatigue you? No.

Are you confined indoors? No.

Do you dissipate in any way? No.

What has been the cause of your complaint? Don't know.

How often do you have sexual intercourse? No much.

Is sexual intercourse satisfactory in every way? Yes.

Are the seminal discharges (during sexual intercourse) too quick or too slow? No; all right, I guess.

Do you lose any semen in your urine? Not that I know of.

Do you lose semen during movement of the bowels? Not that I know of.

Do you have emissions of semen at night with or without dreams? Yes, with dreams.

Does the semen ever pass from you during the day when you have amorous thoughts or when in company of women? No.

Are you attended by erections? Yes.

Are the erections weak? No.

Is there any loss of sexual desire or power? No.

Have your privates wasted or become small? No.

Is the prepuce (foreskin) long? Not very.

Have you any Varicocele (a knotted condition of the veins in the scrotum or bag)? No.

Are the erections strong? Yes.

Does the scrotum hang low? No.

Is there stricture (obstruction) in the water passage? No. [75]

How often do you urinate? 4 or 5 times a day.

What is the appearance of the urine? Light yellow.

Is its passage painful? No.

What is the condition of your stomach? All right.

What is the condition of your bowels? All right.

Are you troubled with piles or pinworms? No.

Is there any inflammation or soreness of the rectum? No.

Are you ruptured, if so, describe same, and do you wear a truss?

Are you restless and wakeful at night? No.

Have you ever had gonorrhoea (clap)? No.

(Testimony of G. A. Leonard.)

Have you ever had gleet (gonorrhoea over three months)? No.

Have you ever been under treatment? No.

If so, by whom and how long?

Could you call, if necessary? No."

That is a copy of the blank I sent to him. With that I wrote this letter.

"Oroville, Cal., July 14, 1912.

Dr. Jordan.

Dear Doctor:—I have received your letter and the paper and I have not answered before because I have been wanting to get the bottle to mail the urine in and I didn't get it till today."

I have a note there: "Dr. Jordan, S. F. Letter addressed to Paul Allen. Litmus paper soaked just an instant in three ounces water, to which was added five tea leaves, five drops of ammonia and pinch of salt. Sample of this solution forwarded same date as urine." The bottle contained the same mixture.

The next letter is July 26, 1912.

"Mr. John Caroway,

Oroville, Calif.

Dear Sir and Friend:

Ten days ago I wrote asking you to send me another sample of your urine for analysis. I analyzed the former liquid you sent me, but this analysis was not to my liking and I want another test made. Kindly send it at once, as you have [76] already paid for the analysis and I will make the second one free.

"Yours sincerely,

Dr. L. J. JORDAN.

Dict. X."

(Testimony of G. A. Leonard.)

I sent two bottles. There was practically no difference between the contents of the two bottles, only salt had been added; in the second bottle we added a certain amount of salt—practically the same mixture with the addition of salt. On August 7, 1912, I wrote another letter.

“Dr. Jordan.

Dear doctor: I have received your letter asking me for more information about my case and wanting some more urine saying the specific gravity of that I sent you was only 1011. Now, I don't know anything about what you mean by the specific gravity of it I am sure so I just made the water in the bottle and sent it to the office for mailing by my brother, now I have had these losses a year or two and I have one about every 3 weeks or so. I would have wrote you before but the postmaster here would not let me mail the bottles unless it was packed in a tin box so I had to get another and the man at the drug-store had to send away for it. Now please let me know soon what you think is the matter with me.

Yours truly,

JOHN CAROWAY.

Box 451.”

There is another one of July 11th. Here is another of July 16, 1912. “I thank you for your remittance of \$2.50, which I have credited to your account.” That is the one acknowledging receipt of the first bottle.

Mr. PRESTON.—(Reading:) “I also received your letter and the question blank and bottle of liquid. As to this sample you sent me, there is noth-



(Testimony of G. A. Leonard.)

ing present to indicate the presence of urine. The specific gravity of same being 1001, practically the same as water. I must ask you to send me another sample. Be sure and send the first urine you pass in the morning after arising, and send a little larger quantity, I want to make another test, and must do so before [77] I can give you the correct diagnosis. It is for your own good that I ask you to do this. It will not be necessary to pack the sample of urine in tin box. Wrap it well with fine paper, and enclose it in coarse paper wrapper and it will come O. K.

I will also ask you to give me further information regarding the history of your case; how long have losses occurred; when did same start; (at what age), and any further information you think I should have. Kindly do this at once, so I can send you a report.

Yours sincerely,

L. J. JORDAN.

Here is another letter of August 8, 1912.

“Dear Sir and Friend:—

“I am in receipt of the sample of urine you sent me this morning, and upon analysis I find that there is no sugar present, but there is a great deal of albuminous material—which is very probably waste energy and excessive losses. This is a condition that should have your immediate attention and care. No delay should be allowed by a person of your age.

“The weakening effect on the system is bound to be injurious and have a tendency to weaken you,

undermine your health, and leave the system more accessible to the ravages of disease.

“The human body can be compared to a piece of machinery. If any part of the body is subjected to abuse, or over-work, that part is sure to become weak, and unable to perform its functions properly. Then it must be repaired at once, or the whole machine is bound to go to pieces. A little care and attention in the beginning will set matters aright. The evil effect of losses has a pronounced tendency to weaken the whole human body. It begins at the nerves, and through them impairs the uses of the eyes, ears, heart, lungs, bladder, kidneys, etc. The treatment necessary to restore them must be genuinely good. New blood, new bone and new cells, fibres, and tissues must be placed instead of the old decayed matter. The blood must be purified and sent [78] in an invigorating and sustaining *stem* through the organs to nourish the parts.

“If you place your case in my hands, I must have your co-operation and assistance. I do not want to take any case, as I cannot afford to sacrifice my reputation, unless the patient is sincere and honest in his desires. However, the fact that you were willing to pay for analysis of urine shows that you are interested, and I am impressed with your evident sincerity. I promise you that you will be benefited if you will place your case in my hands and follow out your instructions and advice. I am willing to make it a very easy method of payment, in order to help you get started. I will send you the first

(Testimony of G. A. Leonard.)

month's medicines for \$15.00, and then you can pay me \$10.00 a month thereafter. Usually a condition of this kind requires from 2 to 4 months for a cure. You came to me in good time, however, and I am sure you will be benefited very materially in a short time.

"All remedies are prepared in my own laboratory, and under my personal supervision. All packages are sent out without marks of any kind to denote where they come from. Everything is done to protect the patient. May I expect your initial remittance of \$15.00 by return mail. If you treat at once, I am positive you will never regret placing your case in my hands, and I assure you of my earnest efforts in your behalf at all times. Kindly let me hear from you at once.

"Yours very sincerely,

"Dr. L. J. JORDAN."

Another letter dated August 10, 1912.

"Mr. John Caroway, Box 451, Oroville, Calif.

Dear Friend:

I have your letter of the 7th inst., and note what you say. I wrote you on the 7th, and you probably had not received my answer when you wrote. The first bottle you sent me, the urine was very low in Specific Gravity—which means that it was of [79] very poor quality—about the same as ordinary water. The specific gravity to be normal should be from 1011 to 1022. However, the last urine you sent me tested about 1024, indicating that there was albuminous material present—most probably indicating waste energy and excessive losses of vital fluids.

“It is evident that your system is becoming very weakened from the losses you are sustaining. The system may become in this condition from various causes, as excess, injury, sickness, or self-abuse, etc. Probably one of the greatest contributory causes results from boys abusing themselves. This naturally tends to weaken the organs and unfit them to perform their functions properly. The body is like a delicate piece of mechanism—if any particular part is subjected to abuse or strain, that certain piece naturally will give way under the strain—and needs repair before it breaks down entirely and throws the whole system out of order. I believe this is the clearest way to explain it to you. The system then needs a tonic and restorative. The parts that are lacking in power and strength must be built up to normal. New bone, new blood, new secretions, new muscle, tissues and cells must be replaced instead of the old decayed and lifeless parts now in the system. As I stated in my letter to you on the 8th inst. I will send you the first month’s treatment for \$15.00, and then you can pay me \$10.00 a month after that.

“You are young and probably have good health in every other way except weakness. Your system should respond very quickly to the treatment and the chances are a very few months will completely restore you. I have made it a point never to take any case unless the patient is sincere and honest in his intentions. I cannot afford to take cases where the patient is merely trifling, or a curiosity seeker. However, your letter impressed me very much and



I believe you would make a very desirable patient and follow out my [80] instructions and advise to the letter, in order to obtain the desired results at the earliest possible time. I know that you will recommend my methods to any suffering friends after you have become cured.

“Kindly do not allow any delay in the matter. If you start now you have the best time of the year to treat, as it is coming on cool weather.

“All medicines are sent carefully packed, and without marks of any kind on the packages to denote whom they come from. I protect the patient in every way.

“Hoping to receive your remittance by return mail and assuring you of my best efforts at all times in your behalf, I remain,

“Very sincerely yours,

“Dr. L. J. JORDAN.

Diet. X.”

One dated August 21, 1912:

“Mr. John Caroway, Box 451, Oroville, Calif.

Dear Friend:

“I had been expecting I would have your case ere this. I don’t know why you don’t even write me in answer to my letters. I am sure I have tried to do my best to get you started. You have paid me money for analysis of urine, which you will lose if you do not take treatment. I don’t want to see you do this. Send me \$15.00 for the first month’s treatment at once. This is very reasonable and the small fee is made especially to get you started. Then you will



only have to pay \$10.00 a month 3 or 4 month's treatment will no doubt place you in proper condition. Let me hear from you at once.

“Very sincerely yours,

“Dr. L. J. JORDAN.

Dict. X.”

Here is another letter dated September 3, 1912.

“Mr. John Caroway, Oroville, Calif.

Dear Sir:

I had rather expected you would be courteous enough at least to reply to my last letter, and state your intentions. [81] If you do not want to take up treatment with me, why, well and good—but if you do intend to treat with me, why then, I naturally want your case before too many complications develop. You have already invested \$2.50—why not continue, as you will suffer an entire loss by not starting now. I made you what is really a low fee for treatment, or \$15.00 for the first month and \$10.00 a month thereafter. You will know when you treat with me, that you have all the knowledge, skill and experience that Dr. Jordan has gotten through years of study and experimentation. Could any proposition be any more fair? I hope you will not cast this letter aside, but instead that you will sit right down and remit for the first month's treatment. Remember, the winter will soon be upon us—and why not become a man before 1913 rolls around? Isn't it worth the while, and the expenditure of a small amount of money? Can you afford to neglect yourself?

I leave it to your own good judgment at this time to do as you see fit, but as a young man of good sense and knowledge, I think you will choose the proper course.

Awaiting your early reply, I am,

“Very sincerely yours,

“Dr. L. J. JORDAN.

Diet. X.”

Another one dated September 12, 1912:

“Mr. John Caroway,

Oroville, Cal.

Dear Sir:

I have written you several letters without a reply, and I cannot understand whether you received my letters or not. The only way I could find out whether they went astray would be to write the postmaster at Oroville, telling him the date I wrote them to you, and that as you were considering taking treatment, I deemed it my duty to reach you if possible. However, I do not like to write to your postmaster, as it might be embarrassing to you—so I hope this letter will reach you direct. You have paid me \$2.50, which I don't wish to see you lose, and ask that you remit [82] \$15.00 for the first month's treatment. I made this very low fee to get you started. Then you can pay me only \$10.00 a month thereafter. Isn't this a fair way to you? Is there anything else that I can do to get you started? If so, let me know. I am willing to go any length. Kindly reply to this

so I will know whether your mail is being given to you or not.

“Very sincerely,

“Dr. L. J. JORDAN.

Dict. X.”

I did not write any more letters in September.

Here is one dated June 12, 1913:

“Mr. John Caroway,

Oroville, Cal.

Dear Sir:

How are you coming along. I am anxious to begin treatment in your case. Delay always makes it more difficult of cure. The principal object of your life today should be to become a well and strong man, able to cope with all the situations you meet. The intense competition in life, both in love and business, is such that success comes only to those who fit themselves for and are able to stand the strain.

“The battle belongs to the strong. The race to the swift. The fittest is chosen and alone survives. The strength of all chains is measured by their weakest links. No man is stronger than his weakest organ. That organ is not strong that leaks and wastes vitality placed there by the economy of Nature for a definite purpose.

“Waste not thy seed on the stones by the wayside.

“I can and will make you well and strong. I will repair the damage done by your own mistakes.

“If you wish to make a man of yourself, I will help you.

“The knowledge to do this does not come of itself,

(Testimony of James W. Woltz.)

nor from ignorant friends. You have only the experience of yourself. I have the experience of thousands—saved and guided into the right road. [83]

“Now, tell me where the delay is and why you do not respond. I want to help you. If money is the cause, be frank and tell me. I may suggest a way within your means. Tell me all about it, the cure first and above all things.

“Yours very truly,

“Dr. L. J. JORDAN.

2AA.”

“P. S.—If you wish to take up treatment at this time, I will allow the same terms as when I wrote you some time ago, or \$15.00 for the first month and \$10. a month, thereafter.”

That is all the correspondence, the test correspondence, that I have. I was never down at the Jordan Museum. I have heard there was a Dr. Jordan there, but not now. I have seen the defendant here but I am not personally acquainted with him.

**Testimony of James W. Woltz, for Plaintiff.**

JAMES W. WOLTZ, called as a witness on behalf of the United States, after being duly sworn, testified as follows: My name is James M. Woltz. Covering the period of 1912 and 1913 I was employed by the postoffice department of the Government. I conducted some test correspondence with reference to the Jordan Museum of Anatomy here. I wrote some of the correspondence in Government's Exhibit “C” for identification, and received some at my office. What purports to be an advertisement—a newspaper

(Testimony of James W. Woltz.)

slip—I got that from the San Francisco “Examiner” at my office in Washington, D. C., on March 17, 1912. That was the date of the newspaper. I wrote the letter headed “Tombstone, Arizona,” addressed to Dr. Jordan. That is a true copy of it. It is as follows:

“Dr. Jordan,

“986 Market Street,

“San Francisco, Calif.

“Dear Doctor:

“Will you please send me your book *Philosophy of Marriage*, which I see in an advertisement of the San Francisco [84] Examiner you will send free.

“I want to get married but have not set any date as I want to see some doctor first and thought your book might have in it what I want.

“Please address me here.

“GEORGE R. ALBERTS,

“Box 1648, Tombstone, Ari.”

A letter dated May 27, 1912, was received in reply to it on June 3, 1912. It is as follows:

“Mr. George R. Alberts,

Box 1648, Tombstone, Ariz.

Dear Sir:

This to acknowledge the receipt of your favor of recent date. I am mailing to you by this mail my book ‘*The Philosophy of Marriage*,’ under separate cover. Should it not arrive promptly, please notify me.

“This book will give you valuable information on Sexual Hygiene, and the care of the functions that



go to make the boy and man a success in his work, and above and beyond all, live a happy married life.

“All dominant magnetic men are sexually strong. They are attractive and commanding to both sexes.

“My space here and in the book forbids a discussion of special or particular cases. I will be pleased to discuss your case, or give you any further information you may desire, in plain language, so that you will have a clear understanding. The same to any friend of yours you know to be making mistakes, if he will write me.

“I have touched on the practice known as Onanism (self-abuse), because of its very great importance to men in all walks of life. It is a great factor in the success and happiness of a man's business and matrimonial career. It is a brain and nerve leak readily curable. If not cured and every trace of the injury done removed, no matter how late in life, disaster and failure are sure. [85]

“Tell me your story in confidence. I will advise you true. The secret of success is nervous energy. The hustling spirit of enterprise is only an expression of that energy. Nothing is impossible to the man who has the strength to try for it. No man has strength who allows vitality to constantly leak or waste away. The one is courageous and brave, the other is a coward.

“I call your attention to another important factor: The effect and cure of Gonorrhoea, Syphilis and other venereal disease, both remote and recent. Sometimes the entire life is changed by bad advice

(Testimony of James W. Woltz.)

and by ignorant treatment by persons pretending to know, leaving results removable only by the expert specialist. All diseases of this nature are curable. Their effects on the stomach, kidneys, liver and nervous system are removable.

“Answer all the questions on the enclosed blank, then mail to me with the return of the two slips, after following directions printed on the envelope.

“Trusting to hear from you at an early date, I am,

“Very truly yours,

“Dr. L. J. JORDAN.

“P. S.—Inclosed chemical test papers take the place of the bottle of urine called for in question blank.

Diet. by O. A.”

I sent this letter in reply, a copy of which is:

“Your letter to hand and I am sending the paper you sent to me all filled out as well as I know how. If you will please write to me about how much it will cost to cure me also how long it will take, so I may know about what to do, I will be very glad.

“Very truly yours,

“GEORGE R. ALBERTS.

“Box 1645.”

Here is the symptom blank that I sent, a copy of the blank I sent; after, I received the reply as follows, dated June 7, 1912: [86]

“Some time since, on your request, I mailed you a copy of my book, ‘The Philosophy of Marriage,’ which I trust you have received and read with care.

“I presume you are suffering with some ailment

you do not understand and from which you desire relief. A knowledge of sexual hygiene, self and sex and their relation to life and health, diseases of life-giving organs, vicious practices and their results and sequelae do not come intelligently of themselves, nor correctly from ordinary every-day sources, nor by the advice of ignorant friends.

“False modesty no doubt prevents you consulting one who has given his entire professional life in guiding thousands along the road to health, happiness and success. I want your confidence, as others have given it during all of my professional career.

“I am sure you wish to make a man *for* yourself; you do not want to be a failure before your time. You wish vigor and stamina in order to overcome the difficulties you meet in the battle for existence. To do this you must not be handicapped by weak organs. You must be strong in the loins and gird them up, as directed in the Good Book. No chain is stronger than its weakest link. Ships in storms are at the mercy of the weakest bolt.

“Self-pity and the demon of discontent, the weight that holds thousands back, is caused by ill health of one or more of the vital functions.

No matter who you are, no matter how much money you have, no matter if you are able to pay cash, no matter if you must have terms, no matter what the conditions, you cannot afford to neglect yourself. Self-preservation is the first law of nature. This relates to your health, as well as fighting to defend

your life, or the life and health of your offspring.  
[87]

“Therefore return my blank with the questions all answered. Do not allow a secretive nature, engendered by this condition and a symptom of it, to delay and prevent you obtaining a complete cure.

“Do not allow money matters to interfere. I assure you that all charges will be reasonable and within your means. We have never worked a hardship on anyone. Answer immediately.

Very truly yours,

“Dr. L. J. JORDAN.

“Dict. by T. B.”

Another one dated June 11, 1912:

“This is in reply to yours of recent date. The chemical test papers and question blank were carefully and scientifically considered. From this data it is my judgment that you have an excess of amorphous urates and phosphates, indicating wasted energy, anemia neurasthenia at the expense of some of the functions of the body. You require and demand treatment to place you on par with your fellow men.

You will find the testicles are weak and flabby and are not manufacturing healthy spermatozoa. There is no evidence of Bright's Disease, or proof of Diabetes, although an overworked kidney may lead to both. You will find mucous strings flocculi or sediment in the urine indicating prostatic inflammation at the neck of the bladder, with the consequent loss of vitality and absence of complete sexual



satisfaction absolutely required by all male animals of health.

“Your case is a complicated one requiring careful and scientific treatment on the part of any physician who takes upon himself the responsibility of treating you. If you give your case into my hands I must have honest co-operation on your part, following to the letter my instructions. [88]

“I will take your case and furnish all medicines required in the course of treatment for \$50.00 cash, or, if you wish to pay on time, \$20.00 down and \$10.00 monthly; time required, about three or four months. If you accept either of these propositions which are very liberal, kindly remit the amount with which to start in, and continue to do so until cured. Sexual neurasthenia results from the violation of the laws of health so impairing the system that it ceases to perform its functions.

“The victim is awakened by dreams, the result of this disturbance; this is continued, usually occurring at shorter intervals often accompanied by erotic dreams, until the organ becomes incapable of performing its function, producing a long life of reflex irritations and complications.

“You cannot afford to lose your stamina or to be a failure in life. Low spirits never bother the healthy. No one can be happy or successful unless well. There is latent power in every one—all it wants is to be awakened, and cared for.

“Expecting an early reply, I am,

“Your very truly,

“Dr. L. J. JORDAN.



“Dict. by F. L.”

Here is a letter written on the 8th and sent to the postmaster at Tombstone, Arizona to be deposited in the mail. It reads as follows:

“Dr. L. J. Jordan,  
#986 Market St.,  
San Francisco, Calif.

Dear Doctor:

Your letters all were received., I think I have delayed writing you and thought maybe I would be able to get hold of the money to send you for the monthly treatment, but it is pretty hard to do that just now with the cost of everything so hard to get and high. So I will have to wait a while longer.

Very respy.,  
GEO. R. ALBERTS,  
Box 1648.” [89]

This is the reply, dated August 20, 1912.

“Dear Sir and Friend:

I have your letter this morning, and am very glad to hear from you, I am sorry there has been so much time wasted, as if I had your case shortly after you wrote me first—you would be well on the way to recovery of a strong sexual and physical condition before this time. I do not wish to keep any man from receiving the help he needs on account of money.

“I have found through experience that even if I have to treat a man for absolute cost of medicines, etc., that it will pay me, because the patient is grateful and after he becomes cured he will naturally

recommend his friends to me, and in that way I am benefited. I know and realize that money is a hard thing to get—but, my dear sir, just stop and realize that perfect health and sexual vigor is worth more than all the money in the world to you. You cannot afford to let your condition run along any further. The losses and strain that is now imposed on your system is causing harm that you will ever regret—and the longer this occurs, remember the harder and more costly it is to cure. You have already perhaps noted one effect; that is, wasted organs. That will show where the drain is sapping the very strength and vitality of the system. You no doubt have the same aspirations that a young man has. You have thoughts of the enjoyments of a happy home, a loving wife and family, and peace and contentment—but you know and realize that you cannot afford to marry while in your present condition. It would shame and disgrace you, and humiliate any girl you made your wife. You could not give her the happiness she would expect—and I don't think you are the man to disappoint anyone—not if I judged your character from your first letter in the right light.

“Now, I am going to make you a proposition. I think we can be of mutual benefit to each other, and I am going to reduce the [90] cost of treatment to as low a fee as possible, and come out even myself. If you will start the treatment this month, I will send the first month's course for \$10.00 by express. Then you can send me \$7.50 per month

thereafter. I hope you will take advantage of this, Mr. Alberts, as it is really a very extraordinary offer—but I don't want to see you neglect yourself any longer, and I know that if you do—it will be a hard case to restore; hence for your own sake I suggest that you exert every effort to start treatment this month.

“Three or four months' consistent treatment will no doubt place you in perfect physical, sexual and mental efficiency.

“I hope you will appreciate my efforts. I feel sorry for any young man in your state, and especially one whom I know to be honest and sincere in his intentions—as I believe you are. There is absolutely no reason you should be lacking in those manly qualities. All it requires is a scientific treatment and your co-operation. May I have it at once?

“Please reply to this letter, and if possible remit at once so I may have your name on my list before the 1st of September. Let me hear from you anyhow, as to what you will decide to do. I thank you for a reply.

“Yours very sincerely,

“ Dr. L. J. JORDAN.”

Here is one dated June 13, 1913, the last final appeal:

“Once again I take the opportunity of writing to you to ask why it is that you have failed to even reply to my letters and have failed to show the least interest in your future health and welfare which you

(Testimony of James W. Woltz.)

know will be permanently blighted if you continue to neglect yourself as you have ever since writing to me.

“I can assure you that I have taken a more than ordinary interest in your particular case and have done all possible to urge you into action and see the necessity of treatment now, but you [91] have not even answered me to say what your intentions were or what you had done in this matter.

“It is immaterial to me whether or not you take my treatment, but I am interested in your case and wish to see you well and, in fact, it would be a pleasure for me to treat you free of charge to know that you had taken treatment and have been cured.

“I am sure you have acted in this way in a perfectly thoughtless manner, and, in fact, it is due no doubt to the inroads made upon you by this disease; therefore, I will ask you again to kindly answer my letters and if you wish treatment let me know or, if not, be kind enough to show your appreciation of the interest taken in you, by at least advising me what disposition to make of the records I have of your case.

“Expecting some reply, if only through courtesy, I am,

“Yours very truly,

“Dr. L. J. JORDAN.

“Dic. by T. N.”

Cross-examination.

When I prepared this bottle, it did not occur to me that a man who was passing in his urine am-

(Testimony of James W. Woltz.)

monia, tea, salt, and library paste would be in a normal, healthy condition.

Tuesday, April 27, 1915.

**Testimony of Edmond Honvery, for Plaintiff.**

EDMOND HONVERY, called as a witness on behalf of the United States, after being duly sworn, testified as follows:

Mr. PRESTON.—I do not think I made a formal offer of the contents of the file exhibit “C” for identification. I would like to do that at this time.

Mr. FAIRALL.—We make the same objection.

The COURT.—The objection is overruled.

Mr. FAIRALL.—Exception. We also make a motion to strike out. [92]

The COURT.—The motion is denied.

Mr. FAIRALL.—Exception.

A. My business is postoffice inspector and I am located at Washington, D. C. I have been postoffice inspector since 1912. As part of my business, I supervised certain tests, what was called test correspondence, with reference to Dr. L. J. Jordan here, or the Jordan Museum of Anatomy.

Q. From whom, if anybody, did you get your orders in connection with such matters?

Mr. FAIRALL.—We object to that upon the ground that it is irrelevant, immaterial and incompetent.

The COURT.—The objection will be overruled.

Mr. FAIRALL.—Exception.

A. Directly from the chief inspector who was my predecessor under the Postmaster. I am now chief



(Testimony of Edmond Honvery.)

inspector located at Washington, D. C.

Upon the initiative of the chief inspector this investigation was begun. This package purports to be a file of test correspondence conducted by me under the name of Anson Ashford, Buckley, Washington, with Dr. Jordan, 986 Market Street, San Francisco. The first act done under the name of Anson Ashford by me is this paper here, a carbon copy of a letter, which was written by me October 12, 1912. I will read it.

“Buckley, Wash., Oct. 12, 1912.

“Dr. Jordan,

San Francisco, Cal.

Dear Doctor:

I have seen your ad. in the papers and as I would like to consult you about my case you would let me know full particulars about your treatment. Hoping to hear from you soon, I am, yours very sincerely,

ANSON ASHFORD,

Gen. Del.”

The original of this letter was put in an envelope, a stamp put on it, addressed to Dr. Jordan, 986 Market Street, San Francisco, California, then it was placed with this letter of instructions [93] in an official envelope and sent to the postmaster at Buckley, Washington, with instructions to mail it at Buckley, Washington, and if any reply or any letters were received at Buckley, Washington, addressed to Anson Ashford, General Delivery, they were to be sent to me at Washington, unopened

(Testimony of Edmond Honvery.)

under official cover. In response to that, the first letter received from Dr. Jordan came in an envelope postmarked San Francisco, California, October 5, 1912, addressed to Mr. Anson Ashford, General Delivery, Buckley, Washington. Then followed that a letter postmarked San Francisco, California, October 25, 1912. Then I filled out the symptom blank on October 29, 1912, and sent it to the postmaster at Buckley, Washington, for mailing, accompanied with \$2.50. It was sent by registered mail. I received a return registry card signed by Paul Allen, and a letter mailed at San Francisco, California, November 7, 1912; another letter mailed November 18, 1912; another letter postmarked December 3, 1912, San Francisco, Cal.; a further letter postmarked San Francisco, Cal., December 14, 1912; another letter postmarked December 26, 1912; another letter postmarked January 5, 1913, and a last letter postmarked June 30, 1913. These various *letter* were received by me under official cover from the postmaster at Buckley, Washington, unopened. I opened them in Washington. I sent out the first letter and the symptom blank and received nine letters. I sent \$2.50 and two postage stamps, \$2.54, and registered the letter. I did not take any treatments. I sent a sample of urine with the symptom blank. The contents of that bottle are water, a little tea, a little ammonia and glucose. I sent a similar bottle of the same kind of content. There was mixed four ounces of the stuff, and two ounces were sent

(Testimony of Edmond Honvery.)

and two ounces were retained. This is the two ounces that I retained.

(Offered in evidence and marked "exhibit 6.")  
[94]

There was no litmus paper sent.

Q. Without reading any of the correspondence excepting the symptom blank, I will give you just a little idea what this man was suffering from:

"Name. Anson Ashford.

2. Postoffice? Buckley, Wash.
3. Express Office? Buckley, Wash.
4. How long have you lived in your present location? All my life.
5. Does the climate agree with you? Yes.
6. Age? 25. Weight, 180. Heights, 5-11.
7. Color of hair? Brown. Color of eyes, Brown.
8. Are you married? No.
9. If so, for how long?
10. Your nationality? American.
11. Your occupation? Farmer.
12. How long have you been so employed? 10 years.
13. Does your work fatigue you? Yes.
14. Are you confined indoors? No.
15. Do you dissipate in any way? No.
16. What has been the cause of your complaint?  
Dreaming off nights.
17. How often do you have sexual intercourse?  
Not very often.
18. Is sexual intercourse satisfactory in every way?  
Yes.

19. Are the seminal discharges (during sexual intercourse) too quick or too slow? Just right.
20. Do you lose semen in your urine? Don't know.
21. Do you lose semen during movement of bowels? Don't know.
22. Do you have emissions of semen at night with or without dreams? Yes, with dreams.
23. Does the semen ever pass from you during the day when you have amorous thoughts or when in company of women? No.
24. Are you attended by erections? Yes.
25. Are the erections weak? No. [95]
26. Is there any loss of sexual desire or power? No.
27. Have your privates wasted or become small? No.
28. Is the prepuce (foreskin) long? No.
29. Have you any varicocele (a knotted condition of the veins in the scrotum or bag)? No.
- 29 $\frac{1}{2}$ . Are erections strong? Yes.
- 29 $\frac{3}{4}$ . Does the scrotum hang low? No.
30. Is there stricture (obstruction in the water passage)? No.
31. How often do you urinate? 4 or 5 times daily.
32. What is the appearance of the urine? I suppose all right.
33. Is its passage painful? No.
34. What is the condition of your stomach? All right.

(Testimony of Edmond Honvery.)

35. What is the condition of your bowels? All right.
36. Are you troubled with piles or pinworms? No.
37. Is there any inflammation or soreness of the rectum? No.
39. Are you ruptured, if so, describe same, and do you wear a truss? No.
40. Are you restless and wakeful at night? No.
41. Have you ever had gonorrhoea (clap)? No.
42. Have you ever had gleet (gonorrhoea over three months)? No.
43. Have you ever been under treatment? No.
44. If so, by whom, and how long?
45. Could you call, if necessary? No, too far away."

Under date of November 7th the following letter is written Mr. Anson Ashford on the letter-head which has already been described:

"Dear Sir and Friend:

I thank you for your remittance of \$2.50 which I have credited to your account. I also received the sample of urine and the question blank and other data. Same was carefully considered and the urine analyzed, and I find your condition is quite serious. The urine shows large percentage of sugar, showing a serious condition known as Diabetes. Immediate treatment is necessary, [96] and my suggestion would be that you take up treatment at once. This is affecting the kidneys and no doubt causes the pains you mention. Do you ever feel a numb feeling at the ends of your fingers, or toes, ears, nose,



etc.? Your condition is very weak, as is shown by emissions at night, and it is my opinion that your case is quite complicated. The losses at night have a tendency to weaken you, and derange the nervous and sexual systems. It causes loss of appetite, little desire for work; lack of memory, embarrassment, pains in sexual organs, weak eyes; lack of confidence and strength. The cells, muscles and tissues become wasted through an insufficient supply of blood or blood that is very much decreased in nourishing power. Your system needs a strong tonic and restorative, not merely a stimulant. Something that will build new blood, new muscles and new tissues, and throw off the decayed and waste substances, engorging the parts with a supply of fresh, pure blood, and building the entire system up to normal.

“Whether you treat with me or not—I advise you to seek at once the services of a competent and reputable physician; one that you know is above the average. If you do treat with me, I can promise you results if you give me your co-operation and follow out my instructions and advice. I want no man’s case unless he is honest and sincere and wants to be benefited. I am a very busy man and have no time to dissipate with triflers. From the fact that you sent me \$2.50 for a report, I think you are sincere and that you would make a desirable patient. I have spent the greater part of a lifetime treating, studying and curing the diseases of men, and have won a reputation that is second to none by my fair methods to all.

(Testimony of Edmond Honvery.)

“I am willing to take your case on that condition—namely that you will obey my instructions and take my treatment faithfully. I will give you credit for the \$2.50 you paid me, and send you the first month’s medicines for \$22.50. Then I will reduce your [97] fee after the first month to \$15.00 a month. I make this offer of monthly payments as it may be more convenient for you to pay in this manner. A few months will put you in good condition, and if you start now, you will notice very good results in a short time—but my dear young man, whatever you do, don’t let this condition run along. If you want help, I can give it to you and would like to have your case at once. May I expect you on my list by return mail? You have youth and perhaps a good constitution, and your rapid and complete recovery should be gained without the possibility of failure.

“Hoping to have your remittance by return mail, I am,

“Yours sincerely,

“Dr. L. J. JORDAN.”

The COURT.—Who signed that?

Mr. PRESTON.—Dr. L. J. Jordan. The handwriting varies, but the signature is the same.

Mr. FAIRALL.—They are typewritten, aren’t they?

Mr. PRESTON.—The letters are typewritten. The signatures are in ink.

Under date of November 8, 1912, the following:

“Mr. Anson Ashford,  
Buckley, Wash.

Dear Sir and Friend:

As it is about ten days ago since I wrote you, and not having had a reply, I thought perhaps my letter did not reach you. I received your remittance of \$2.50, for which I thank you and analyzed the *same* of urine—which denotes that you should take treatment at once and I made you a monthly payment fee if you wish to treat with me. That is, I will send the first month’s medicines for \$22.50, and then you need only pay \$10.00 a month thereafter.

“From my long experience I can treat you successfully if you give me your case at once. However, I never take a case unless a patient is honest and sincere in his intentions and will follow out my instructions and advice. I cannot afford to give up my time, or *trest* patients that are insincere. It would hurt my reputation. [98] However, if you start at once, your case will progress nicely and favorably from the start. But as I stated, your condition is one that demands immediate attention, and my dear young man, you must not neglect it. At your age, this condition should not occur. You would be doing yourself a great injustice and immeasurable harm. Once virility and strength is entirely lost, it can never be regained. Your data that I have shows the system is gradually growing weaker from resultant effects, and each day means a great deal to you. I would like to treat you—knowing and believing that you would be more than

satisfied with results. If you start at once, remit me \$22.50 for the 1st month's treatment, and I will at once send same by express. There are no marks on express packages to denote who ships it. Everything is private. Kindly reply at once.

“Very sincerely,

“Dr. L. J. JORDAN.”

December 14th there is another letter as follows:

“Once again I take the opportunity of writing to you to ask why it is that you have failed to even reply to my letters and have failed to show the least interest in your future health and welfare which you know will be permanently blighted if you continue to neglect yourself as you have ever since writing to me.

“I can assure you that I have taken a more than ordinary interest in your particular case and have done all possible to urge you into action and see the necessity of treatment now, but you have not even answered me to say what your intentions were or what you had done in this matter.

“It is immaterial to me whether or not you take my treatment, but I am interested in your case and wish to see you well and, in fact, it would be a pleasure for me to treat you free of charge to know that you had taken the treatment and have been cured.

“I am sure that you have acted this way in a perfectly thoughtless manner and, in fact, it is due no doubt to the inroads made upon you by this disease; therefore, I will ask you again to kindly



[99] answer my letters and if you wish treatment let me know or, if not, be kind enough to show your appreciation of the interest taken in you, by at least advising me what disposition to make of the records I have of your case.

“Expecting some reply, if only through courtesy, I am,

“Yours very truly,

“Dr. L. J. JORDAN.

“Dic. by T. N.”

Under date of December 26, 1912:

“I do not understand why you do not reply to my letters. Haven't you been getting them? I wrote to the postmaster at Buckley asking if you had changed addresses, or if your mail was held up anywhere, as you sent me data from which I learned you were badly in need of treatment and wanted to reach you. However, I thought I had better not mail this letter to the postmaster, but wait and write you again first to see if I could get a reply. There must be something wrong somewhere, as you evidently were in earnest when you sent me \$2.50 for a report, and after I told you your condition, I don't see how you can continue to be careless. Remember you have but one life to live, and you better protect your health. Your condition is such that if you delay much longer, you will become in such a way that a cure will be very hard to bring about—if at all. If you don't wish to take treatment with me, well and good, but please write me to that effect so I can file my records of your case. I don't want to annoy any



sick man with unnecessary letters. It will only take 5 minutes of your time and the expense of a 2¢ stamp, and I think this would be the least you could do—to advise me one way or the other. Remember, I don't want your case after you become incurable and I don't want your case unless you are sincere and will follow my instructions and advice. I am a very busy man and haven't time to give away to curiosity seekers.

“If money is the cause of your delay, advise me so. I am willing to help every man all I can. I don't want to keep any man [100] from treating who lacks money. If I cure him he will recommend his friends to me and I will benefit in that way. I will reduce your first month's fee from \$22.50 to \$20.00 even if that will aid you any; then you need only pay \$10.00 a month after. Isn't this fair? For \$2.00 I will start you at once, and wouldn't it be a very pleasing thought before the New Year to know that you were started on the road to health. May I have you on my list of patients at once? I thank you for the courtesy of a reply, even if only half a dozen lines, so I can know what to do with the records of your case, and to obviate the necessity of writing the postmaster to learn if he is holding up your mail.

“Wishing you a pleasant holiday season, and a Happy New Year, I am,

Sincerely yours,

Dr. L. J. JORDAN.”

(Testimony of Edmond Honvery.)

On June 13, 1913, the last letter received:

“I am very much interested in your cure, and I cannot understand how it is that you are content to allow your case to run on as it has and sacrifice your health for life in this way. The principal object in life today is to become well and strong, able to cope with all situations you meet,” and so forth.

(Letter offered in evidence and the file marked “United States Exhibit No. 7.”)

Cross-examination.

I am not a chemist. Studied chemistry a little bit in school. My object in putting glucose in this sample was I tried to show a case with an indication of diabetes. I thought it would produce evidence of diabetes. The other symptoms are perfectly healthy. I put the ammonia in to imitate the smell. That is all. That did not indicate anything in the way of disease. I have not consulted any physician or chemist about what constituted healthy urine. I made the sample to resemble urine to see whether a proper examination was made of it. It looked like urine and smelled like urine—it did, but it does not now. I have not looked at the [101] bottle for some time and I do not know how it smells. There is no formula in my office of instructions as to what chemicals are put in water for the purpose of producing this effect. It is all left to our discretion. What induced me to use these particular ingredients in this water was: My purpose was not to deceive the doctor, but to give him something that looked like urine, and for him to make the proper tests, recog-

(Testimony of Edmond Honvery.)

nized, of urine. I do not know whether that was the proper amount of sugar that appears in urine in diabetes, but diabetes is a disease which is shown in the urine by excessive sugar. I know that. I tried to introduce that. I also put in ammonia for the purpose of giving some odor; also some tea to give the color. I thought I would produce a liquid that looked like urine and smelled like urine, and had a diabetes condition in it.

**Testimony of H. C. Walker, for Plaintiff.**

H. C. WALKER, called as a witness on behalf of the United States, after being duly sworn, testified as follows:

My name is H. C. Walker. I reside in San Jose, Santa Clara County, and have resided there for about nine years. I am fifty-two years of age. I have visited the place here in San Francisco known as the Jordan Museum. Prior to visiting that place, I had correspondence with the institution.

Mr. FAIRALL.—Is this for the purpose of showing a similar offense?

Mr. PRESTON.—Yes.

Mr. FAIRALL.—We object to it upon the ground that no offense has yet been shown against this defendant, and until that fact is established, similar offenses cannot be shown. We therefore object upon the ground that it is immaterial, irrelevant, and incompetent and is violating one of the fundamental rules of evidence and the rights of the defendant to introduce such evidence.

The COURT.—The objection will be overruled.

(Testimony of H. C. Walker.)

Mr. FAIRALL.—Exception. [102]

I could not tell just how many letters I wrote—about three, I guess, but I am not sure. The letter you show me here is a copy of the one that I wrote. I did not keep copies of the letters that I wrote to the institution. I received their replies to these letters.

I can identify replies that I received. The letters in this package dated July 6, 1912, July 18, 1912, August 29, 1912, September 6, 1912, October 1, 1912, October 24, 1912, November 17, 1912, December 17, 1912, February 10, 1913, March 27, 1913, April 9, 1913, May 7, 1913, June 11, 1913, July 17, 1913, August 15, 1913, September 17, 1913, October 10, 1913, and October 21, 1913, are ones I received from Dr. L. J. Jordan.

Q. How came you to give these to the postal inspectors, if you did?

Mr. FAIRALL.—I object to that as immaterial.

The COURT.—The objection is overruled.

Mr. FAIRALL.—Exception.

A. I was requested to. The cards you show me I received from the Dr. Jordan Company—Dr. L. J. Jordan. I visited the place about eight months after the first correspondence. I doctored with them by mail up to that time, for about eight months. Then I visited the place. I visited it at that time and did not visit it again until several months later. After that I visited it about seven or eight times—during the whole time—about. It was probably ten times. I commenced this treatment on the 6th of



(Testimony of H. C. Walker.)

September, 1912, and quit doctoring there before the holidays of this year, 1914.

Q. Prior to the time of your receiving any treatment or medicines, did you fill out or not a symptom blank?     A. I did.

Mr. FAIRALL.—Is it understood that this is all under the same objection?

Mr. PRESTON.—Yes, it is.

The COURT.—The objection is overruled. [103]

Mr. FAIRALL.—Exception.

I have no copy of the symptom blank. I filled the symptom blank and I sent it back. I filled out the question blank. I told them I was troubled with a weak back, that was my main trouble, and then afterwards began to take medicine. I took it for about eight months before I visited them. At the expiration of eight months, I came down to visit them, and there was a doctor there examined me, and he told me that my case was more complicated than he thought before, and I would have to take a different treatment. My condition had not improved any during the eight months. I paid them about \$200 to \$280. I am not positive about the man who examined me when I went there. There was a man that looked very much like Dr. Freeman. I am not positive that it was Dr. Freeman. It was a man that looked very much like him. I only saw the man twice. He was a stout heavy-set man. That is about all I know. He did not tell me his name. I was examined in their inner office. When I went there I called for Dr. Jordan, and he said that the



(Testimony of H. C. Walker.)

doctor was not in, to wait a few minutes and he would be in; I waited a few minutes, and this gentleman came to the door and asked me into the room. That gentleman examined me. He told me I was troubled with prostate glands and sexual weakness. He said my case was stubborn and required more expensive medicines, and he wanted me to pay an extra \$100 for treatment. I did, but not at that time. I told him I did not have the money then, and he wanted me to pay a part down and pay installments. I did not do anything then. I went home. A few days later, he wrote me a letter regarding that I was leaving it alone too long, and not taking up the treatment, so I made up my mind that I would try it again, and I commenced treating and treated on for several months again. I went back again and was treated the next time by Dr. Rice. I did not see the man that had treated me before. I told the doorkeeper [104] that I wanted to see Dr. Jordan, and he told me the doctor would be in in a few minutes. He did not mention any name. I then went into the waiting room and waited for him. After I was there probably twenty minutes, there was a man came to the door from the opposite room and called me into the office and made an examination.

Q. Did anybody else in the institution—did you make any other inquiries about Dr. Jordan?

A. Not that I remember of.

Mr. FAIRALL.—That is objected to as immaterial.

(Testimony of H. C. Walker.)

The COURT.—Objection overruled.

Mr. FAIRALL.—Exception.

Mr. PRESTON.—We offer to read at least part of this correspondence.

Mr. FAIRALL.—We move to strike out all this testimony upon the ground that it does not show a circumstance, in this: that the evidence shows that this man took the treatment in person, and after a personal examination, and there is no similarity between the cases at all.

The COURT.—The motion will be denied.

Mr. FAIRALL.—Exception.

The first one of these letters is dated July 6, 1912, on the same letter-head as heretofore.

“Mr. H. C. Walker,  
San Jose, Cal.

Dear Sir:

This is to acknowledge the receipt of your favor of recent date. I am mailing to you by this mail my book ‘The Philosophy of Marriage’ under separate cover,” etc.

The next one is dated July 18, 1912:

“Some time since on your request I mailed you a copy of my book the ‘Philosophy of Marriage’ which I trust you have received and read with care.

“I presume you are suffering with some ailment you do not understand and from which you desire relief. A knowledge of sexual hygiene, self and sex and their relation to life and health, [105] diseases of life-giving organs, vicious practices and their results and sequelae do not come intelligently

of themselves, nor correctly from ordinary everyday sources, nor by the advice of ignorant friends.

“False modesty no doubt prevents you consulting one who has given his entire professional life in guiding thousands along the road to health, happiness and success. I want your confidence, as others have given it during all of my professional career.

“I am sure you wish to make a name for yourself; you do not want to be a failure before your time. You wish vigor and stamina in order to overcome the difficulties you meet in the battle for existence. To do this you must not be handicapped by weak organs. You must be strong in the loins and gird them up, as directed in the Good Book. No chain is stronger than its weakest link. Ships in storms are at the mercy of the weakest bolt.

“Self-pity and the demon of discontent, the weight that holds thousands back, is caused by ill-health of one or more of the vital functions.

“No matter who you are, no matter how much money you have, no matter if you are able to pay cash, no matter if you must have terms, no matter what the conditions, you cannot afford to neglect yourself. Self-preservation is the first law of nature. This relates to your health, as well as fighting to defend your life, or the life and health of your offspring.

“Therefore return my blank with the questions all answered. Do not allow a secretive nature, engendered by this condition and a symptom of it, to delay and prevent your obtaining a complete cure.

“Do not allow money matters to interfere. I assure you that all charges will be reasonable and within your means. We have never worked a hardship on anyone. Answer immediately.

“Very truly yours,

“Dr. L. J. JORDAN.

“Dict. by T. B.” [106]

Another letter dated August 29, 1912.

“Mr. H. C. Walker,  
San Jose, Calif.

Dear Sir:

This is in reply to yours of recent date. The chemical test papers and question blank were carefully and scientifically considered. From this data *is it* my judgment that you have an excess of amorphous urates and phosphates, indicating wasted energy anemia neurasthenia at the expense of some of the functions of the body. You require and demand treatment to place you on par with your fellow men.

“You will find the testicles are weak and flabby and are not manufacturing healthy spermatozoa. There is no evidence of Bright’s Disease or proof of Diabetes, although an over-worked kidney may lead to both. You will find mucuous strings flocculi or sediment in the urine indicating prostatic inflammation at the neck of the bladder, with the consequent loss of vitality and absence of complete sexual satisfaction absolutely required by all male animals of health.

“Your case is a complicated one requiring careful and scientific treatment on the part of any physi-



cian who takes upon himself the responsibility of treating you. If you give your case into my hands I must have honest co-operation on your part, following to the letter my instructions.

“I will take your case and furnish all medicines required in the course of treatment for \$50.00 cash, or, if you wish to pay on time \$20.00 down and \$10.00 monthly; time required, about three or four months. If you accept either of these propositions, which are very liberal, kindly remit the amount with which to start in, and continue to do so until cured. Sexual neuresthenia results from the violation of the laws of health so impairing the system that it ceases to perform its functions. [107]

“The victim is awakened by dreams, the result of this disturbance; this is continued, usually occurring at shorter intervals, often accompanied by erotic dreams, until the organ becomes incapable of performing its function, producing a long line of reflex irritations and complications.

You cannot afford to lose your stamina or to be a failure in life. Low spirits never bother the healthy. No one can be happy or successful unless well. There is latent power in every one—all it wants is to be awakened and cared for.

“Expecting an early reply, I am,

“Yours very truly,

“Dr. L. J. JORDAN.

“Dict. by F. L.

“P. S.—The urine received and analyzed with above results. I thank you for your remittance of \$2.50.”



I had a contract with them for \$50.00.

*Later* dated September 6, 1912:

"I thank you for your remittance of \$20.00 which I have credited to your account, and am expressing you the first month's supply of medicines today, which I hope come safely to you.

"In order to obtain the best results in the least time, a few rules should be observed.

"Chew your food always thoroughly and slowly before swallowing to mix with the juices before going into the stomach, making digestion easier. Never eat much sweets, pies, cakes, etc. Plain food such as meat, potatoes, bread and butter, rice, macaroni, fruits and vegetables are the best. Do not drink tea or coffee. Good water and milk and buttermilk are the best drinks. Do not use alcoholic liquors in any form, and use tobacco sparingly.

"Never overeat. It is better to leave the table a little hungry. Never eat or drink much after 7 o'clock in the evening. Always sleep in a cool, well-ventilated room. Never sleep on your back. Always sleep on your side. [108]

"Practice deep breathing. That is draw the air into the lungs slowly through the nose until the lungs are filled to capacity, then breathe slowly out until lungs are empty. Repeat 10 or 15 times each morning. Get all the sleep you can.

"Keep your mind free from worry. Also do not let the thoughts dwell on lewd or impure thoughts or desires. This is bad on the sexual system and organs. Don't have intercourse more than once a

month for the first two or three months. It weakens your vitality very much, and you must be careful in all things, even regarding the pleasures.

“About 3 or 4 days before your medicines are gone, report your condition, symptoms, and effect of medicines, etc., and remit for the second month’s course.

“Hoping you will come along nicely, and with best wishes, I am,

“Very sincerely yours,

“Dr. L. J. JORDAN.”

“Dict. X.”

Letter dated October 1, 1912:

“I thank you for your remittance of \$10.00, which I have credited to your account—and I must say that your report is pleasing. You say you feel some better and stronger, but that is all the change you can see. Well, Mr. Walker, how much change would you really expect after one month’s treatment. I am sure you could not expect any greater noticeable effect. However, you will notice a greater improvement as you continue, as once a start is made—the rest comes easier. I am expressing you more medicines to-day which I hope comes to you safely, and trust the next month when you report you can say that there is still greater improvement.

Kindly follow out the instructions as closely as possible—as given in my former letter.

Very sincerely yours,

Dict. X.”

Dr. L. J. JORDAN. [109]

Letter dated October 24, 1912:

"I thank you for your remittance of \$10.00, which I have credited to your account and I am expressing you more medicines to-day which I hope reach you in due time. Come up and see me when you can get away. I am very glad to learn your report as it is most encouraging to me, and I am sure it must be to yourself also.

"Hoping next month will see still greater improvement, I am,

"Yours very sincerely,

Dr. L. J. JORDAN."

Letter dated November 17, 1912; letter of December 17, 1912; letter of February 10, 1913; and letter dated March 27, 1913;

"I am somewhat surprised at not hearing from you since your return home. I cannot understand why you did not write me as I had expected to start you on the course of treatment necessary after I had examined you. You must be without treatment of any kind, and I am sorry there has been any neglect that may cause a set-back—or allow complications to develop. Is money the cause of your delay. The agreement was that you were to send me \$40.00 upon your return home. I do not wish to cause money or the lack of it to prevent your having treatment. Send what you can, and I will be entirely willing to help you overcome the conditions detrimental to your health and physical condition. Kindly do not delay, as a great deal of danger is incurred in this manner.

“Awaiting your early reply and remittance, I am,

“Sincerely yours,

“Dr. L. J. JORDAN.”

Letter dated April 9, 1913;

“I thank you for your remittance of \$20.00, which I have credited to your account and am expressing you a package of treatment to-day which I hope comes to you in due time and in good condition. I wish to assure you that your case will have every attention, and nothing will be overlooked that will add to your quickly receiving desirable benefit. Take the treatment regularly, and you can remit [110] with your next report, or before that time if convenient to you.

“Very sincerely yours,

“Dict. X.”

Dr. L. J. JORDAN.

Letter dated May 7, 1913:

“I thank you for your remittance of \$20.00 which I have credited to your account—and I am sending you by express the next month’s course of treatment. I am a little disappointed at not having a few lines at least as to how you have been getting along and how you feel, and the effect of the last month’s treatment. Also if your bowels are working regularly, and whether your appetite and digestion are all right. Also if the urine is natural, or whether you notice a sediment. Is there any tenderness in the scrotum (testicles)? Please advise me fully as to these matters when you send in your next report for treatment. Hoping the package I am sending to-

day will come to you in good order, and trusting that you are doing very fine, I am,

Yours very sincerely,

Dr. L. J. JORDAN."

Letter dated June 11, 1913, and another one July 17, 1913;

"I thank you for your remittance of \$20.00, which I have credited to your account—and I am expressing a package of treatment to you to-day to relieve the pains you speak of. I have paid special attention to this matter and no doubt these pains in *grouns* and tenderness of testicles are caused by a stagnation of the blood in these parts. If the blood does not circulate freely, the parts become paralyzed and cause an irritation of the delicate linings or membrane which causes pain. Taking this into consideration, I made special pains to prescribe the treatment sent to-day to relieve this irritation and stagnation. I hope the package will come to you safely and it is my belief that great relief will be experienced the coming month. I enclose a test paper herein which treat and return with your next remittance and monthly report. Be very careful [111] when you report next month to advise exactly every condition and symptom of your case.

"With kind personal regards and best wishes, I remain,

"Very sincerely yours,

"Dr. L. J. JORDAN."



(Testimony of H. C. Walker.)

On August 15, 1913, September 17, 1913, October 10, 1913, and October 21, 1913:

“Are you coming up to San Francisco this week to see the Portola carnival and Land Show? Many of my out-of-town patients are coming up, especially Saturday to see the big electrical parade on Saturday night and thinking you would come up, I write to ask you to call if you do so. It is about 7 months since you were here and I would like to talk with you personally and examine you. If you cannot come up return the test papers I sent you with your remittance and report so you will not run out of treatment. Hoping to shake hands with you shortly, or hear from you, I am,

“Very sincerely yours,

“Dr. L. J. JORDAN.”

The last treatment I received at that place was just before the holidays. I was not treating with any other doctor in the meantime.

#### Cross-examination.

I sent real urine; obeyed instructions just as I got them. I took the medicine, having received a great deal of it. I followed the instructions of the doctor. I went one time to the office and had an examination. He did not give me much of an examination. He tested my urine and examined my lungs and back, the prostate glands. That was some examination. He examined my prostate gland with his finger. I do not know that he had a rubber covering on his finger. I do not know anything about that. He examined the prostate gland with his finger through the

(Testimony of H. C. Walker.)

rectum, and said that I had enlarged prostate glands. I do not think he [112] explained that might be the cause of sexual weakness. He did not explain why he examined me for that purpose. I met a doorkeeper there, as I have said. Mr. White was the doorkeeper. I saw Mr. Robinson there once. He was the doorkeeper. He looks a great deal like Dr. Freeman, about the same size as Dr. Freeman. That is the man that was at the door, I think. That was not the man that examined me.

I could not say that the doctor who examined me had a moustache or a plain face. He was a heavy, stout man. I do not pretend to say that it was Dr. Freeman that treated me. He was a stout man. I only saw him once. I do not know whether it was he or not. It looked very much like him. I do not remember about the moustache. He was a stout man, a stout heavy set man.

Mr. PRESTON.—Q. Would you mind standing up, Doctor? Does he still look like the man to you?

A. He looked very much like him.

Mr. FAIRALL.—Q. If you knew that Dr. Freeman had not treated anyone in there for ten years in any way, shape, or form, it would not change your opinion?

A. I do not know anything about that. The way I came to meet the officers of the Federal Government of the Postal Department: they wrote me a letter. I cannot recall the date, but it was a short time ago. I have not got that letter. In that letter they just asked me to send up these letters, but they did not say

(Testimony of H. C. Walker.)

they knew I had these letters. I do not know how they knew I had them.

Q. Did they tell you that at the Grand Jury investigation it had been disclosed that one Paul Oesting had testified that you had certain letters?

Mr. PRESTON.—Object to that as immaterial, irrelevant and incompetent.

The COURT.—The objection will be sustained.

Mr. FAIRALL.—Exception.

I wrote to the Dr. Jordan Museum. Regarding these letters, I [113] did not write to anybody. The postoffice inspector wrote to me. I did not come up and visit him, nor did he come to visit me. I just sent him the letters. This is all the correspondence I ever had. I do not know the postoffice inspector's name, do not recall it now. I do not know Paul Oesting. I do not remember ever seeing that gentleman before (referring to Mr. Oesting), until I saw him in the courtroom yesterday.

Mr. PRESTON.—Q. Was he the man who examined you? A. No.

Mr. FAIRALL.—Q. When did you say you commenced treatment with the Jordan Museum?

A. I think it was on September 6th, 1912, I quit just before the holidays this last year, 1914.

Mr. FAIRALL.—We wish now to renew our motion to strike out this testimony on the ground that it shows an entirely different state of facts. It is not within the time alleged in the indictment, and it is based upon treatments, personal interview and per-

(Testimony of H. C. Walker.)

sonal examination of the urine, and personal examination of the patient in the office, and it would not show a similar act, because it is not similar; it has nothing to do with the same conditions; this treatment, so far as it appears here, in actual, absolute good faith; there is nothing here to brand these statements as false or fraudulent, or made for the purpose of defrauding. Apparently on its face and so far as appears from the testimony, the statements were made in absolutely good faith for the treatment of the patient.

The COURT.—The motion will be denied.

Mr. FAIRALL.—Exception.

Mr. PRESTON.—May we offer these in evidence? Several of them are exact duplicates of the others.

Mr. FAIRALL.—We make our motion to strike out on the same grounds as our objection to the testimony.

The COURT.—Overruled.

Mr. FAIRALL.—Exception. [114]

(The documents were marked “United States Exhibit No. 8.”)

Mr. FAIRALL.—Q. You were in fact suffering from the trouble which was mentioned in this complaint to the doctor, were you not?

A. Yes. But I do not know that I was suffering exactly for what they were treating me. I was suffering from a weak back, and they claimed sexual weakness also. I did not claim so. It is not a fact that I have suffered from sexual weakness but very little. I may have suffered sometime.



(Testimony of Edward Boerner.)

**Testimony of Edward Boerner, for Plaintiff.**

EDWARD BOERNER, called as a witness on behalf of the United States, after being duly sworn, testified as follows:

My name is Edward Boerner; my business is stenographer and employed at the present time with the Pacific Gas & Electric Company. It will be three years in September since I have been with them. Prior to that time I was employed by the Jordan Museum from May 5th or 6th, 1909, until the latter part of October, 1910, covering a period of about seventeen or eighteen months. My duties were stenographer and cashier and my office was located in the Jordan establishment.

Generally the location of the various rooms and offices at that time may be described: You came in a little bit of a hallway and then you turned to your left and you came into the reception room where the patients were, where they waited their turn, and then another office, and you came into my office—that is the executive office where people met, and that is where I worked. First there was what is known as the case taking room where they had the case taken, another room, a reception room for patients, and another room known as treatment and drug room, and operating room, together with the museum of anatomy. I know Dr. Freeman here and have known him ever since I began work there until now.

Q. Did he or not have an office there? [115]

Mr. FAIRALL.—We object to that upon the ground it is immaterial, irrelevant and incompetent,



(Testimony of Edward Boerner.)

it is not within the issues of this case; his service therein was prior to 1910, and the charge embraced within this Indictment would not be within the statute of limitations, being more than three years prior to the first offense charged.

The COURT.—The objection will be overruled.

Mr. FAIRALL.—Exception.

A. He used to call there almost every night when I worked there, when he was in this city. Sometimes he was out of the city, and then of course he could not call. My duties there were as stenographer and cashier. I took care of the money, opened up the mail, wrote all the letters and kept the books.

Q. To whom was the mail usually addressed?

A. To Dr. L. J. Jordan.

Mr. FAIRALL.—We object to that on the ground it is immaterial, irrelevant and incompetent.

The COURT.—The objection is overruled.

Mr. FAIRALL.—Exception.

The mail in the first place, was addressed to Dr. L. J. Jordan, but whenever there was any money sent and the man did not like to go to the postoffice and bank and have it made out in the name of the doctor, on account of embarrassment, he addressed it to a private name.

Mr. FAIRALL.—We move to strike that out as irrelevant and hearsay, a volunteer declaration on the part of the witness, and a conclusion.

Mr. PRESTON.—Q. In what name was the mail received?

A. Dr. L. J. Jordan and Paul Allen.

(Testimony of Edward Boerner.)

Q. Who was Dr. L. J. Jordan; that is, while you were there, if anyone? [116]

Mr. FAIRALL.—We object to that upon the same ground.

The COURT.—Objection overruled.

Mr. FAIRALL.—Exception.

A. I don't know who he was. I got my instructions from Paul Oesting as to carrying on the business. The board of directors of the company met once, to my knowledge, while I was there. The directors were G. M. Freeman and his wife, Paul Oesting and Fred T. Baker. G. M. Freeman and his wife, Paul Oesting, and F. T. Baker were present at the meeting of the board of directors. I do not remember who the secretary of the meeting was. There were minute books kept there.

Q. Were there any minute books kept there?

A. Yes.

Mr. FAIRALL.—I object to that upon the ground that it is immaterial, irrelevant and incompetent. We are not trying the corporation.

The COURT.—The objection is overruled.

Mr. FAIRALL.—Exception.

Mr. PRESTON.—Q. Who kept them?

Mr. FAIRALL.—The same objection.

The COURT.—The same ruling.

Mr. FAIRALL.—Exception.

A. I don't know. I really never saw them much myself. I only knew there were minute books there. A cash-book and two books, one being the cash-book, and one being the treatment book, were kept by the

(Testimony of Edward Boerner.)

institution. I could not say positively whether Dr. Freeman ever examined the books, although I have a slight recollection that he did. When he would visit the place, he would come around, in the evening he *would there* and sit down, and sometimes he would be in the patients' room, and sometimes in the office in which I was located. Sometimes he would stay there an hour and a half or probably two hours, and then maybe he would not stay long at all. [117] I know the license was paid by this concern for carrying on this business. The license was issued in the name of G. M. Freeman. I do not think I got any particular paper at the time the money was paid for a license. I just took the license quarterly, every three months, up to some policeman on Eddy street, had the party up there O. K. it, and then took it up to the license clerk on McAllister Street and paid \$25, and he stamped "Paid" on it. That is all we had. I made out the checks for the expenses that were had in conducting the business, and Paul Oesting signed them. Dr. Freeman had authority to sign them if he was there, but I don't remember of his ever signing any. I remember of him signing one check in particular. It was made out in the name of a man called Mongetti. It was for \$150. It was a refund from a guaranty given him in case they did not cure him they would refund his \$150 of the \$250 paid. He was a patient. I remember that Dr. Freeman drew a check for that. I was the stenographer there and we had stereotype letters at that time.

Q. I will ask you how they were arranged?

(Testimony of Edward Boerner.)

A. That all depended a good deal on the patient's writing, upon what he wanted. If he wanted the "Philosophy of Marriage," he got the book "Philosophy of Marriage." with the first letter known as "1A," which covered a question blank and litmus papers, a stereotyped letter known as "1A." It depended upon whether he wrote for anything more. If he did not, then he got what was known as the "TB" letter. That "T" really represented 2, I do not know what the B represented. If he did not answer that letter he got a "3B."

Mr. FAIRALL.—We move to strike this out on the ground it simply shows the custom that existed in 1910.

The COURT.—The motion is denied.

Mr. FAIRALL.—Exception.

If he did not answer that letter, he got a "4B." That was all [118] the B's we had. After he got the fourth B, his name then went in the dead pile. What I did about him then depended a good deal upon the man; if he wrote back and rehabilitated himself, we wrote him another letter, and then if he did not come through, he got what was known as first neglect. That was marked "FN." After that if he did not write, he got the 2d neglect. Three neglects in all. After he had neglected three times, it depended upon the man again, if he wrote again; then he got more, but usually by that time he quit. If he failed to respond, we did not get him at all. I was in the court-room yesterday and heard these letters read. In the file of letters known as Government's Exhibit "B,"



(Testimony of Edward Boerner.)

I recognize some of the letters issued by me in 1910. This is a second neglect, and here is a third neglect. That is marked. Here is another letter. This man has gone the limit; he got what is known as the cabinet letter. That differed from the others in this: After he had taken treatment and did not care to take any more, or quit in disgust, and they were trying to resuscitate him again, that was known as a cabinet letter. Here is a special cabinet. That is where they sent him these papers, a little different from that. There were stock letters that are not in this file. There are one or two missing, the "1A," the "2B" and "3B." The "TB" is missing out of that file. In "Government's Exhibit No. 4," the letter of June 17, 1912, is a "2B." Here is one that I never saw before, a form never used while I was there, a new one. Here is the "1A." That is in response to an inquiry for a book. "FL" is the one that I have never heard of. The next one is another new one. There were other stock letters that I do not find a copy of here, that were used at that time. This is an appliance letter, which is a letter selling appliances.

Q. Appliances for what?

A. Something known as a magnetic garment.  
[119]

Mr. FAIRALL.—We object to that as immaterial, irrelevant and incompetent, and as no part of this case.

The COURT.—The objection is overruled.

Mr. FAIRALL.—Exception.

We kept these things in stock.



(Testimony of Edward Boerner.)

Q. How much did they cost you?

Mr. FAIRALL.—We object to that on the same grounds.

The COURT.—The objection is overruled.

Mr. FAIRALL.—Exception.

A. \$3.50 apiece. These were not graded at all. They were known as 1, 2, and 3. The selling price was generally anything that they could get, but in the main it was \$29—twenty something. I don't remember exactly. And the other was \$18. They were the same article.

Q. In trying to sell these appliances, can you give us any of the contents of the stock letter that you had in connection with that?

A. I can. I remember that one particular letter—I remember that one above any of the rest of them.

Q. Tell us from memory what the contents of that letter were.

Mr. FAIRALL.—The same objection.

The COURT.—Overruled.

Mr. FAIRALL.—Exception.

A. It was quite a long one, and I cannot remember it all. I can remember part of it, but I do not know as I could give the exact words. I have no copy of that. I did not take any with me.

Q. Tell us what you can remember of it?

Mr. FAIRALL.—We object upon the further ground that there is no proof that the letter cannot be supplied.

The COURT.—The objection may be overruled.

Mr FAIRALL.—Exception.

(Testimony of Edward Boerner.)

Mr. PRESTON.—Q. Tell us the contents of the letter as well as [120] you remember it.

A. The letter was in response to test papers sent out, after the party had taken treatment already, and they wanted to make another examination of his urine, and they sent him test papers, and when he sent them back, they acknowledged it saying, "Yours of recent date enclosing chemical test papers at hand, which have been submitted to a rigorous chemical and microscopical analysis, and while I find that there has been a great improvement going on, yet there exists to my surprise a slight paralysis of the muscles governing the seminal tracts. This symptom while not serious has a tendency to completely retard that which is most sought after; a development of the muscles would produce a healthy condition of semen and cause the parts to become large and vigorous, grow larger and stronger, and therefore more able to produce the function for which they are intended. As a matter of fact, I find quite a lot of dead spermatozoa in your urine, indicating the fact that the organs are not manufacturing healthy semen or allowing *it come* in direct contact with the surface through which the urine passes." That is about all that I remember of it. That letter contained the price list of the same article mentioned at three prices.

Q. Who drew the dividend checks or profit checks?

A. Well, they were divided in three, and Dr. Freeman and his wife and Paul Oesting, that is known as B. Bechtold. It was written out to him. I do not mean that Oesting was known as B. Becktold. There

(Testimony of Edward Boerner.)

was someone else—the check was endorsed, was made out to B. Bechtold—that is how I made the check out. When it came back it would have the endorsement of Bechtold and below it would have all the endorsements. The checks that were issued to Dr. Freeman came back with his signature on. I would know the signature of Dr. Freeman if I should see it. The signature on the two checks that you show me is his signature all right, but it is not exactly [121] the way it used to be; it is a little more nervous hand, not quite as good as it used to be. This word “L. J. Jordan” there looks like his signature.

Q. About what proportion of the profits of the business did Dr. Freeman receive while you were there?

Mr. FAIRALL.—We object to that upon the ground it is immaterial, irrelevant and incompetent.

The COURT.—The objection will be overruled.

Mr. FAIRALL.—Exception.

A. One half.

Mr. PRESTON.—Q. About what were the monthly profits?

Mr. FAIRALL.—That is immaterial. We object to that upon the same grounds.

The COURT.—The objection is overruled.

Mr. FAIRALL.—Exception.

A. In the winter it was better than in the summer; in the winter sometimes the profits would be \$2,000 and over, and in the summer months it would be less. That is \$2,000 a month, the dividend. That is what they would divide on the first of the month. Dr.

(Testimony of Edward Boerner.)

Freeman was usually present at that time. I would give him the checks right in my office.

During the time I was there there were two physicians employed. They had quite a few while I was there; they only had two at one time, but changed quite often. The first two that were there were Drs. Morrell and Chisholm.

Q. What were the circumstances surrounding this \$150 check that Dr. Freeman drew in favor of an Italian?

A. This man came in and I think Dr. Freeman—

Mr. FAIRALL.—We object to that upon the ground it is not within the issues of this case.

The COURT.—The objection is overruled. [122]

A. He came in there, and they charged him \$200; that was the price of his fee. He was somewhat suspicious, and he thought he had better have a guaranty, and they gave him a guaranty in the event that they did not cure him, they would refund \$150 of the \$200 paid, and in a matter of two or three weeks, possibly a month, he came back and wanted his money back, and they would not give it to him for some long time, and he called almost a couple of times a week, and then Dr. Freeman decided that he would give it back to him, so he wrote a check for \$150 and I gave it to him, and he kept that in his pocket about a week or ten days.

Q. What was the source of income from this office?

A. There were two sources of income.

Mr. FAIRALL.—I make the same objection.

The COURT.—The objection is overruled.



(Testimony of Edward Boerner.)

Mr. FAIRALL.—Exception.

A. One was an admission to the museum, which was 25 cents, and the other was the patients.

Q. About what proportion of the revenue was derived from each of these two sources?

Mr. FAIRALL.—The same objection.

The COURT.—The same ruling.

Mr. FAIRALL.—Exception.

A. To my knowledge, I think \$90 was the highest, or \$89, or around there, was the highest we took in in a month while I was there, at the museum. The other source of income was all put in one amount, and then the dividend was drawn on the first of the month. The local business was the greatest. These stock letters that I have testified to were kept in a cabinet right over the typewriter. They were concealed, in a way, but very easy of access. All you had to do was to lift up a cover, and they were in there. The cash book was generally kept in the safe, together with the minute [123] books and such things as that, in the office in which I was located. Dr. Freeman had access to those books if he wanted to look at them. I could not say for sure whether he did look at them; it has been some years since I have been there. It is hard to recollect, but he had access to them, and he came in my office quite often. Whether he looked at them I could not just exactly say. At the time he would come in there about 7 o'clock in the evening, he would talk about how the day was, the business of the day—I cannot remem-



(Testimony of Edward Boerner.)

ber exactly the conversation that took place. Dr. Freeman at that time did not maintain offices any other place to my knowledge.

It was generally supposed that Dr. Jordan was there, and patients would ask sometimes for Dr. Jordan; some would ask for Dr. Jordan and some would ask "Is the doctor in?" I did not give any answer. I was not at the door. I was at the back end. There were two different doorkeepers and the janitor. I remember their names, A. M. Robinson and W. H. White.

Q. Did you receive any instruction as to the manner in which you were to carry on your part of the work?

Mr. FAIRALL.—We object to that upon the ground it has not been shown there were any instructions.

The COURT.—The objection will be overruled.

Mr. FAIRALL.—Exception.

A. Yes. I received instructions from Paul Oesting, one of the owners of the business. He was half owner of the business. It did not appear in his name. Oesting is not a doctor or a physician at all. There was no other physician connected with the corporation as a member of the corporation. Dr. Freeman was the only one. I never had any conversations with Dr. Freeman about renewing this license you asked me about a little while ago.

Q. What instructions did Mr. Oesting give you about how you should [124] carry on your business?

(Testimony of Edward Boerner.)

Mr. FAIRALL.—That is immaterial.

The COURT.—The objection is overruled.

Mr. FAIRALL.—Exception.

A. He told me what my duties were, and the important things in the office. He told me the main thing was to always watch that the license did not run out, that is, I should always renew it in time, that is, pay it; take it up to the license clerk and pay it, so as not to run out; that was quarterly, every three months. Other instructions were to see that everything was going on right in the institution, watching the doctors, just to see that they did not commit any thing that would not be becoming in the place. He did not give me any instructions whether or not he wanted patients cured or not cured that came there—that would not be for me. He would not tell me that.

Q. Do you know whether or not he fired any of the doctors because they were attempting to cure the patients?     A. Yes.

Q. How often did he do that?

A. I do not know whether it would be for that reason, or not, but the man was dealing more with curing them than with getting the money. He might not have been curing them, but they thought he was, or he was not getting the money—it was something like that. They were not fired—just let out in a way—you could not say exactly fired. They just said they had a new doctor there. There were three, to my knowledge, that severed their connection with the institution while I was there. I do not know

(Testimony of Edward Boerner.)

whether any of these doctors were licensed physicians. They got a salary of \$100 a month and a commission. I could not say exactly how much it was, but I think it was 10% after the expenses were paid, which was about \$1350 a month—10%—and then when it went over \$300, 12½% or something like that. I do not exactly remember. Anyhow the commission amounted sometimes to more than the salary. [125]

These letters were kept there in advance. They were stereotyped letters, and some of them had been there for six months. I bought them from W. R. Whyte in the Call Building. I do not remember the amounts purchased. It depended upon which one was used the most. All that was left to do was to write the address at the head of the letter. I used to sign the letters with the name of Dr. Jordan. Mr. Oesting generally told me what to put in the letters. He did not tell me very much, just to be careful about what to write, in a jocular sort of way, and keep out of trouble. Somebody would write in and ask for a book, and I would then write letter No. 1 and if I did not hear from them, I would send No. 2. I kept track of the correspondence. I had two groups, one was kept in an index and the other in what was known as a tickler; every ten days they would look him up if he did not answer. Then if he did not answer I would write No. 3 *and then* No. 3. And then he was filed out of the live index in the dead file. Then if he wrote again, I took him out of that and put him in the living correspond-

(Testimony of Edward Boerner.)

ence. It all depended on how many letters I wrote. When they were all together there were seven stock letters. That was the practice that was followed in each case. Generally most all of them came in the mail, got the same treatment. The medicines were mailed out. The same kind of medicines were sent out. Robinson and White sent the medicines. The doctors made them up and they mailed them—they wrapped them up and addressed.

I could not say how many classes of medicine they had. They might have analyzed some of the urine that was sent in, but I do not remember. I used to go in there and I used to see them with it in a little jar—I don't know what they were doing. It was generally not analyzed. As the samples came in they took them out in the other room, and I do not know what they did with them. I [126] do not know anything about the facilities they had there. I did not buy any microscopical instruments while I was there. There was that a doctor brought once. They did not fire him for bringing it. No question arose about buying them, to my knowledge.

Q. Now, these letters, they all say, "I have spent all my life in this practice." One of them says, "I have spent fifty years in this business," and one thing and another. What instructions did you get about that?

A. They did not give me any instructions.

Q. Do you know where the stock letters, as you call them originated from?

A. Indeed, I could not say.



(Testimony of Edward Boerner.)

Q. Is it a fact that they were there when you got there?

A. Some of them—the cabinet, the special cabinet and appliance, those three originated there, but the others were in stock. They were there when I went there. Oesting gave me the inside of this appliance letter. Another doctor, and several of them, got together on it. They were right in my room there with me; some of them would make suggestions, and then I would type them up and submit it for their approval, and they would make suggestions.

At the time this letter was formulated, there was no specific case under consideration. It was just for the purpose of getting up a special letter. When that letter was being whipped into form, there was a doctor there by the name of Chisholm—he offered some suggestions. He was one of the doctors, but I could not say exactly positively—it has been some time. I have been out of there five years, and I cannot just recall. I know that this appliance letter was manufactured there, and after it was manufactured I sent it out, only when they found a case that had already been through the regular course of treatment—he generally got that. There might have been fifty names we were corresponding with or there might only be half that number—there might be fifty and might be half that. I could not say. While I was there, I was not [127] called upon to prepare any report to the medical examiners *and* to whom the company was composed of, or anything of that sort. I have not conversed with



(Testimony of Edward Boerner.)

Dr. Freeman any, since I left there, to my knowledge. I might have met him several times. There is no feeling of antagonism existing between me and any of these parties. I severed my connection with them voluntarily.

Cross-examination.

Dr. Freeman was not present when that form letter was made. He never instructed me at all about these letters. I think he prescribed for the patients while I was there once, during the year I was there. He prescribed for someone who called at the office. It was not in regard to sending out letters by mail. He had nothing to do with that, so far as I know.

The check I saw him sign was in a settlement of a contract which they made with a patient who called at the office. It was not a mail order. Most of their business was done through calls at the office; quite a few of the cases went through the mail, a good many. The major portion of the business, that is, in money, came locally. Dr. Freeman had access to the books, and if he wanted to get into the safe, he could have had it opened without instructions from anyone else. He might have at one time carried a key to the safe. Paul Oesting was not a physician. He instructed me to see that the license was renewed. I found the license there in the name of Freeman, and I did not do anything except to go to the bond and warrant clerk's office and renew it. He would O. K. it and I would take it over on McAllister street. I would simply renew it as a

(Testimony of Edward Boerner.)

matter of form in the name of Dr. Freeman. When Dr. Freeman was out of the city, he would not be there for two or three weeks at a time, and there were times again when he was called quite often. I do not remember of his giving instructions to employes in the management of the business, or his taking any part in things of [128] that kind. This one patient I think he treated. I know he was speaking to him, consulting with him in the room. He did not have an office of his own there. He had a place where he generally used to sit, but no regular hours there. Paul Oesting appeared to be the one from whom we took our instructions. We would go to him if we wanted any instructions. I do not remember that Dr. Freeman ever instructed me to send out letters.

I guess Dr. Freeman knew the stock letters were in existence. I am not exactly guessing at it. I know I would if I was in a place like that. The letters were right where he had access to them if he wanted to do it.

Q. I will ask you if you ever had a conversation with Dr. Freeman about treating a patient in which he made a remark as to whether he was *bona fide* treating him?

A. I could not say exactly whether he treated him, but he discussed at one time a certain official who they got quite an amount of money from, and also a unique way of having it brought down to them.

Q. How was the money brought down?

(Testimony of Edward Boerner.)

A. By a messenger.

Q. How much was it?

A. I don't know how much.

Mr. FAIRALL.—I object to that.

A. (Continuing.) It was \$250 that they got, all told, but I don't think they got it all in that amount. Anyhow, it was toward the latter part of the month, and they told him if they got it before the close of the month, they would discount it.

Mr. FAIRALL.—That is only hearsay, and I move to strike it out.

The COURT.—Let it go out.

Mr. PRESTON.—Q I thought you had discussed it.

A. We discussed this part, how they got the money down there, Dr. Freeman discussed it, and he just said how anxious he was to bring the money down before the month closed, in order to save himself [129] the discount. Dr. Freeman said his troubles were imaginary. That is a prominent official here now.

Mr. FAIRALL.—I move to strike that out on the ground it is not shown to have any connection with this indictment, the use of the mails for fraudulent purposes, and conceding it to be fraudulent no time is fixed in which the event took place; that is evidently a little mere reminiscence that occurred in the office about patients in his recollection.

The COURT.—Motion denied.

Mr. FAIRALL.—Exception.

(Testimony of Edward Boerner.)

Mr. FAIRALL.—Q. This related to a time ten years previous, did it not?

A. It was prior to my advent. It will be five years next October that I left the place. He did not say money, he might have said it, but I don't remember. It was just in a casual way that he happened to mention it. It was not a matter of any instructions as to how to do business, or in regard to the conduct of the business. There might have been something that brought it about. I do not remember about ever getting any instructions from Dr. Freeman at all as to taking advantage of anyone or defrauding anyone or doing anything wrong. That conversation I had with Dr. Freeman was in 1910.

**Testimony of A. J. Gock, for Plaintiff.**

A. J. GOCK, called as a witness on behalf of the United States after being duly sworn, testified as follows:

My name is A. J. Gock; I am assistant cashier of the Bank of Italy, Market Street Branch. I have been employed there for four years. During the years 1912 and 1913 I was paying teller. In that capacity I had to pass upon the signatures of the L. J. Jordan Company, of Dr. L. J. Jordan. I have a card from our files showing the signature of L. J. Jordan or Dr. L. J. Jordan. I have that signature card here. [130] This is the card of Dr. L. J. Jordan from our files, the original card. There are two signatures there of L. J. Jordan. The first one is by Paul Oesting and the second signature is by

(Testimony of A. J. Gock.)

G. M. Freeman. Each is written "L. J. Jordan."  
I recognize both of those signatures.

(Signature card admitted in evidence and marked  
"United States Exhibit No. 9.")

On the check of the Bank of Italy, dated January 2, 1915, payable to the order of G. M. Freeman and signed Dr. L. J. Jordan, I identify the signature of G. M. Freeman. That was written by G. M. Freeman.

On the check January 2d, 1915, "Pay to the order of A. V. Freeman" and endorsed "Dr. L. J. Jordan," I identify the signature of G. M. Freeman.

Mr. HETTMAN.—We offer these as "Government's Exhibit 10."

Mr. FAIRALL.—We object to their introduction.

The COURT.—The objection will be overruled.

(The checks marked "United States Exhibit No. 10.")

### **Testimony of James T. Burns, for Plaintiff.**

JAMES T. BURNS, called as a witness on behalf of the United States, after being duly sworn, testified as follows:

My name is James T. Burns. I am connected with the San Francisco "Bulletin" at the present time. During the years 1912 and 1913 I was employed by the Dr. L. J. Jordan Company in the capacity of stenographer and clerk. I think it was from the 22d of May, 1911, up until the place closed. I was present in court this morning and heard the testimony of Mr. Boerner. My position was virtually the same as that of Mr. Boerner. I practically carried on all



(Testimony of James T. Burns.)

of the correspondence in the place. The correspondence was in the form of letters when I went there first; the doctor in charge instructed me how to send out the letters. If an inquiry came for treatment, I simply took the form and filled out this form and gave instructions [131] according to one of these forms. In some instances the letters were dictated. If they were not covered in the form the doctor would dictate the letter or make the notations on the margin of the patient's letter. By "the doctor" I mean the doctor in charge. My duty was to look after all the mail. I also had charge of the books, the day-book and cash-book. That is all. Entries were made from the day-book into the cash-book every morning. The day-book was merely a record of whatever money came into the office during the day. It was generally kept on the desk in the office where I was located for the first two or three months; after that it was locked up in the safe. The book was accessible to any of the members of the company, all of the doctors. If anyone came into the room who had authority to be there, he could easily look through this book to see what the day's receipts were. Dr. Freeman came into the office I was located in, and the books were accessible to him. He very rarely, to my knowledge, if at all, looked over these books at any time. He would come to the office during the day, generally in the forenoon, while I was there, anywhere from fifteen minutes to two hours. He would not stay with me very long; he would generally talk with some of the doctors. These letters that

(Testimony of James T. Burns.)

were sent out were all accessible to him, the form letters. Those form letters were there when I went there, and I don't know how long previous they had been, but I understood for some time. I did not make any changes in those letters from time to time, nor add any form letter to the file. I generally prepared the checks for signing there in the office. Our checks were generally signed the 28th of the month for the general business, and after the 1st of the month for dividends. Dr. Freeman signed checks. He might have signed three or four checks for payment of rent at the end of the month. He always signed the dividend checks himself, I believe. They were always left unsigned—I made them out and they were left [132] unsigned. "Government's Exhibit No. 10," a check made payable to G. M. Freeman, dated January 2, 1915, for the amount of \$99.80, I am pretty sure was a dividend check for the month of December, 1914. That was signed by Dr. Freeman, and the other one also. The other one was a dividend check to his wife. Dr. Freeman always signed his own dividend check to my knowledge. He was not always there at the time to receive his dividends. Sometimes he would not come in until a week or ten days after the first of the month.

The doctors, as a rule, got these letters first. They came from the doctors to me, and the doctors would make notations on the margin of the letter, or a slip of paper is attached and it would come from the doctors to me. Then I would write on the form indicated, to the patient. I was employed on a salary

(Testimony of James T. Burns.)

and had no interest in the company. I was also receiving a commission. My salary was \$85 a month when the place closed, and I got a commission of one-half of 1%. During the time I was there, the commission would average over \$10. I identify the book you now show me as the cash-book which I spoke about a few minutes ago; that was kept by me over the period of December 1st, 1913, to January 8, 1913. On the left-hand side of that book would be office receipts, and the right-hand column was the museum receipts. These receipts were receipts from patients who came into the office and also represents checks that came in through letters. It covered everything, the total receipts, through the treating of patients.

At the top of the right-hand page is the notation: "Dividend account 55, P. Oesting, .01, E. P. Baker, .01, B. Bechtold, 998.98, G. M. Freeman, 998, A. V. Freeman, 2." That represents the dividend of the previous month. That would be December, 1913. I entered the dividends at the first of the month, in the book every month, during the entire book, in the same way exactly as it is here.

Mr. HETTMAN.—I wish to offer this as "Government's Exhibit 11." [133]

Mr. FAIRALL.—We object to the introduction of that testimony against the defendant, for the reason it was not written by him, does not purport to *the* made under his instructions, no testimony that he gave any instructions as to the making of it, or was responsible in any way for its being kept.

The COURT.—The objection will be overruled.

(Testimony of James T. Burns.)

Mr. FAIRALL.—Exception.

Mr. HETTMAN.—Q. Will you read from this book that you kept the amount of dividends that you paid for the following months to G. M. Freeman?

Mr. FAIRALL.—We object to that on the same grounds as the other.

The COURT.—The objection will be overruled.

Mr. FAIRALL.—Exception.

A. There was no dividend the following month, January 1, 1914. I could not tell you that there was a loss from this book. If there was a deficiency it is not shown here. The disbursements are shown to be \$1095.75. There was a loss. That was January, 1914. It was for the month of December, 1913.

Q. This shows he was paid a certain pro rata dividend every month, was he not?

A. Yes, if there was a dividend. He was paid 50% between him and his wife. P. Oesting was paid 1%. Every month 49% was paid to B. Bechtold; E. P. Baker about 1%, and between Dr. Freeman and Mrs. Freeman it covered 50%.

The writing on the brown paper you show is mine. I severed my connections with the concern when it closed. We had a minute-book there. I do not know where it is now, but there was a record kept every month of the dividends and placed in this book, a minute-book. What purports to be an organization meeting is the one I refer to. I think that is the only book that was kept in any way regarding the minutes. The handwriting that is signed on the [134] various pages there is G. M. Freeman,



(Testimony of James T. Burns.)

the defendant's. That was signed in my presence.

Mr. PRESTON.—I want to introduce this in evidence and have the jury read a few samples of the minutes, or hear it read, to see the nature and kind of minutes that was kept by the corporation. It is properly identified, and I think it is admissible.

Mr. FAIRALL.—I object to it upon the ground that this book was in the possession of the defendant in this case, has been taken from his presence without any authority by the Government, and against the will and against the consent of the defendant, and is now in violation of the Constitution of the United States, and is being used as evidence against him, which is therefore inadmissible.

The COURT.—The objection will be overruled.

Mr. FAIRALL.—Exception.

Mr. PRESTON.—Without reading all this book, I will state that the organization meeting was held on the 12th of June, 1908, at 2 o'clock P. M. at Room 603, No. 110 Sutter Street, in this city and county, and these persons were present: George L. Simmons, Robert Stevenson and W. J. Young, when the organization took place. The next meeting of the board of directors was on the 29th of June, 1908; the directors' meeting on the 2d of July, 1908. At that time it first appears that Paul Oesting is President and G. M. Freeman Secretary, they signing the minutes.

This shows that Mr. W. J. Young announced that he had transferred and sold some of his stock in this corporation to Mr. E. P. Baker, that he was no longer a stockholder of the corporation, and tendered his



(Testimony of James T. Burns.)

resignation as president of the corporation and as a member of the board of directors. On motion duly seconded and carried, the resignation of Mr. W. J. Young as president of the corporation and as a member of the board of directors was accepted; and thereupon, on motion duly seconded and carried, Mr. E. P. Baker was duly elected a director of the corporation, vice W. J. [135] Young resigned. Mr. Baker was thereupon called to the chair and announced that the office of president being vacant, nominations were in order for the office of president of the corporation. Mr. Paul Oesting was placed in nomination for the office of president. There being no other nominations, the same were declared closed, and on motion duly seconded and carried, the secretary was directed to cast the ballot for Mr. Paul Oesting as president of the corporation, and thereupon the secretary cast the ballot and Mr. Paul Oesting was duly declared unanimously elected president of the corporation and took his seat as such president of the corporation and of the board of directors. Thereupon Mr. Simmons announced that he had sold and transferred all of his stock in this corporation to Dr. G. M. Freeman, and tendered his resignation as secretary of the corporation and as a member of the board of directors, and on motion duly seconded and carried the said resignation of George L. Simmons was accepted and Mr. Simmons withdrew from the meeting. On motion duly seconded and carried Dr. G. M. Freeman was unanimously declared elected a director of the corporation vice George L. Simmons resigned. The

(Testimony of James T. Burns.)

chair then announced that a vacancy existed in the office of secretary owing to the resignation of Mr. Simmons and declared nominations in order for the position of secretary. Thereupon Dr. G. M. Freeman was placed in nomination for the office of secretary. There being no other nominations, the same were declared closed, and on motion duly seconded and carried the temporary secretary was directed to cast the ballot for Dr. G. M. Freeman as secretary of the corporation and thereupon the ballot was so cast and Dr. G. M. Freeman was unanimously elected secretary of the corporation, and he thereupon took his seat as such secretary.

The secretary then announced that the certificate increasing the number of directors of this corporation from 3 to 4 had been filed in the office of the Secretary of State of the State of [136] California, and that it was necessary that a meeting of the stockholders of this corporation be immediately called for the purpose of electing an additional director and the adoption of a code of by-laws. On motion duly seconded and carried it was unanimously

“Resolved that a meeting of the stockholders of this company be and hereby is called, to be held this 2d day of July, 1908, at the hour of 2:30 P. M., at room 603, French Bank Building, 110 Sutter Street, in the City and County of San Francisco, State of California. On motion, duly seconded and carried, the meeting adjourned. Paul Oesting, President, G. M. Freeman, Secretary.”

A stockholders' meeting was then called and Paul

(Testimony of James T. Burns.)

Oesting represented 49,999 shares. Dr. G. N. Freeman, 49,900 shares; E. P. Baker, one share. Addie V. Freeman, 100 shares. Then here follow the minutes of that meeting signed by Paul Oesting, President, and G. M. Freeman, Secretary.

Then there is a directors' meeting as follows:

"We, the undersigned members of the board of directors of 'Dr. L. J. Jordan,' do hereby consent to the holding of a meeting of the board of directors of the said company at 3:30 P. M., this 2d day of July, 1908, at room 603 French Bank Building, 110 Sutter Street, San Francisco, California. Paul Oesting, G. M. Freeman, Addie V. Freeman and Edward P. Baker." The minutes of that meeting were also signed by the defendant and the president.

The next meeting was called on May 4th, 1909.

"Special meeting was called for the purpose of declaring dividend on the capital stock of the corporation, and upon motion of Paul Oesting, seconded by G. M. Freeman, a dividend of one-half of one per cent on the capital stock of the L. J. Jordan & Company was declared payable this day, namely May 4th, 1909. No further business appearing, meeting adjourned. G. M. Freeman, Secretary."

That was a meeting of the directors.

The next one is an annual meeting of stockholders, on June 1, [137] 1909: "Upon the roll being called a quorum was found to be present, the shares of the L. J. Jordan Co. being represented as follows: G. M. Freeman, 49,900 shares; Addie V. Freeman, 100 shares; E. P. Baker, one share; B. Bechtold (by

(Testimony of James T. Burns.)

proxy), 49,9998 shares; Paul Oesting, one share."

"The minutes of the last meeting were read, and upon motion ordered approved as read."

"A report showing the present status of the business was presented and upon motion of G. M. Freeman, seconded by Paul Oesting, it was ordered received and filed."

"The following named stockholders have been placed in nomination for directors were upon ballot elected to serve for the year ending May 31, 1910, and until their successors shall be elected: Paul Oesting, G. M. Freeman, Addie V. Freeman, Edward P. Baker. No further business presenting, meeting adjourned. G. M. Freeman, Secretary."

The next meeting of directors was at the office of L. J. Jordan, 986 Market Street, San Francisco, June 1st, 1909.

"Upon ballot after nomination by G. M. Freeman, seconded by Addie V. Freeman, officers were elected to serve for the year ending May 31st, 1910, as follows, viz: Paul Oesting, President; G. M. Freeman, Secretary.

The minutes of the last meeting were read and upon motion were ordered approved as read.

Upon motion of G. M. Freeman, seconded by Edward P. Baker, a dividend of one-half of one per cent of the capital stock of L. J. Jordan was declared payable this day, namely, June 1st, 1909. No further business presenting, meeting adjourned. G. M. Freeman, Secretary."

The next meeting was on July 1st, 1909, one month



(Testimony of James T. Burns.)

later: [138] "Special meeting was called for the purpose of declaring dividend on the capital stock of the corporation and upon motion of Paul Oesting, seconded by G. M. Freeman, a dividend of 7/10ths of one per cent of the capital stock of the L. J. Jordan & Company was declared payable this year, namely, July 1st, 1909. No further business appearing, meeting adjourned. G. M. Freeman, Secretary."

The same kind of meeting, for the same purpose, declaring a dividend of 11/10ths per cent on the capital stock of the L. J. Jordan & Company was declared this day, namely, August 2d, 1909. A similar one on September 1, 1909, of 1½%; on October 1, 1909, 1%; November 1, 1909, 1.3%; December 1, 1909, 11/10ths of a per cent. Each meeting was signed by G. M. Freeman as secretary. On January 1st, 1910, there was a dividend of 9/10th%. On February 1, 1910, there was a dividend of 1.4 per cent. March 1, 1910, 1.7 per cent; April 1, 1910, 1.7%; May 1, 1910, 1.3%; June 1, 1910, 1-10%. Then here follows another annual meeting on June 7, 1910, electing the same directors with the same number of shares. A meeting of the board of directors was held on July 1st, 1910, and declared a dividend of 1/10th%. August 1, 1910, a dividend of 2%; September 1, 1½%. October 1, 1910, a dividend of 2/10th%. A dividend of 1.7 per cent November 1, 1910. December 1, 1910, a dividend of 1.6%. January 1, 1911, dividend of 1.2%. A special meeting on February 1, 1911, declared a dividend of 1.5%, and 1.3% next month. March 1st, and 1.3% the next month April, 1911.



(Testimony of James T. Burns.)

May 1st, 1911, 1.8%. June 1, 1911, another dividend. Another annual meeting June 6, 1911, the same stockholders being represented and the same officers elected July 7, 1911, 1.6%. August 1, 1911, 1.8%. September, another one. October, November, December, January, 1912, another. February, 1912, [139] March, 1912; April, 1912; May, 1912; June, 1912; another annual meeting in June, 1912, of the same parties, same directors and same officers elected; August, 1912; September, 1912; October 1912; November, 1912; December, 1912; January, 1913; February, 1913; March, 1913; April, 1913; May, 1913; June, 1913; another annual meeting on June 3, 1913, the same parties; July 1, 1913, another dividend; August, 1913, another; September, 1913, another.

Mr. FAIRALL.—We object to anything that occurred after the last letter set out in the indictment, namely, August, 1913.

The COURT.—The objection is overruled.

Mr. FAIRALL.—Exception.

Each of these minutes is signed in the handwriting of Mr. Freeman. There was no other record kept of the business transacted in the office, besides this cash-book to which I have testified. There was not much other than that. There was a record kept that went more into detail and showed how much came in the mail and one thing and another. It was kept in a plain yellow day-book. That was there when I left, in whose possession I do not know. It was kept in the safe, where all the books were kept. I believe

(Testimony of James T. Burns.)

when I left there it was out on the desk. The title of each book that was kept by the concern while I was there is as follows: Day-book, cash-book, minute-book, and physicians' day-book and physicians' record-book. I had the cash-book here a while ago. The day-book is not here. I have not seen that. That is about all the books that were kept—the day-book, cash-book, this minute-book, and the physicians' books. The entries that were made in the day-book consisted of the amounts paid by each patient for the day, with the name of the patient.

I could not tell you what became of the correspondence received from the patients. I think it was all burned, though, after the [140] place closed, January 8th of this year. I did not see it burned, so I do not know that it was burned, but it disappeared from the office, sometime in February I think, 1915. At the time I last saw it it was in nobody's possession in particular—there was nobody there. This correspondence was kept in the ordinary letter file. They were stored away, some in the back offices and some upstairs. I did not see the stuff moved out. I was back there after the correspondence was moved out, and the place where it had been knew it no more. All the record-books went with it. I believe everything that was there in the way of correspondence or papers went. I have seen certain letters called stock letters. They were gone the last time I was there. The defendant was there after this stuff disappeared, when I was up there, three or four times after the place was closed. It closed again on the 6th of January. Dr.

(Testimony of James T. Burns.)

Freeman, Mr. Oesting and myself and Dr. Rice, I believe, were there at the time it was closed. There was conversation there about closing the place. I do not remember particularly what Dr. Freeman said, if anything. He agreed to close it and go out with the rest. I do not remember that anything was said by Dr. Freeman or in his presence about destroying the correspondence. He did not happen to be there every time I was there after the place closed. I would just run in there as I happened to be going by. I heard things were burned. I did not hear it from the defendant.

Mr. FAIRALL.—I move that all that testimony about burning the records go out.

The COURT.—Let it go out.

I did not send any of these stock letters at the request of Dr. Freeman. I did send some of them away to different patients, different prospective patients. I know Dr. Freeman had access to [141] these stock letters.

Mr. PRESTON.—I would like to offer in evidence, without reading it, the by-laws, the book containing the by-laws, also signed by the defendant in this case as secretary.

(Book received in evidence and marked "United States Exhibit No. 13.")

Mr. PRESTON.—Q. I will ask you whether or not that is one of the records of the corporation?

A. Yes, that is the by-laws. But I never had anything to do with it. I have seen it. I signed some of the correspondence that went out during the time

(Testimony of James T. Burns.)

I was there. I signed the name Dr. L. J. Jordan. There was no Dr. L. J. Jordan connected with that institution while I was there. There was no one who posed, to my knowledge, as Dr. L. J. Jordan.

Q. Would the patients or persons communicating with or visiting this institution ever at any time call for Dr. L. J. Jordan?

A. In the letters they generally directed the letter to L. J. Jordan.

Mr. FAIRALL.—I object to that.

The COURT.—The objection is overruled.

Mr. FAIRALL.—Exception.

Mr. PRESTON.—Q. I am talking about personal visits.

A. I had nothing to do with that. I was stenographer. The letter dated May 27, 1912, "United States Exhibit No. 4," is what I call one of the stock letters kept at the time. That is the "1A" letter. When they sent for a book, they got the "1A" letter. If they did not answer they got the "2B." The handwriting at the bottom there might be Dr. Rice's, but I am not sure. I would not say positively, it may be mine. The only one I have any doubt about in this pile of correspondence is this one here. That may be mine or Dr. Rice's. I did sign the name of Dr. L. J. Jordan. The letter here that is signed "FL"—Dictated "FL," is a fee letter, [142] where a fee was made to a patient. "IB" is a 2B.

Q. Was it a part of the custom of the business to mail to any person from whom you had received in



(Testimony of James T. Burns.)

the mails a letter either some or all of these stock letters?

A. Yes. When I went there first that was the instruction. The special kind of disease that I communicated to them about through this stock letter system was sexual diseases. If a man had a cancer, he would be written a personal letter. Appliance letters were sent out while I was there. In the last stages of a case, they would offer to make a free examination of the urine—I believe that might have been done. The price for the examination of urine was generally \$2.50.

I never had anything to do with pointing out a Dr. Jordan to patients as they came in. I had something to do with purchasing the supplies, the different supplies used in the office like ink, papers, pencils, and so forth. I also purchased the stock letters and medicine.

Q. From whom did you buy your medicines, if you know?

Mr. FAIRALL.—I object to that as immaterial.

The COURT.—The objection will be overruled.

Mr. FAIRALL.—Exception.

A. Most of the medicines came from Langley, Michaels, Redington, or three or four drug houses. I do not know how many classes of medicines we were handling. We had a fairly good-sized drug store. We had in stock these appliances referred to. I do not know what they consist of. I never opened one of them; some metal inside of a cloth covering,



(Testimony of James T. Burns.)

in the form of a belt. I do not know that any of them were sent out broken.

Cross-examination.

To the best of my knowledge, they kept a general stock of drugs. I am not a druggist, but I think they did have quite a number of [143] different kinds of drugs. I would not say there were hundreds, but quite a number of them. We did not carry patent medicines. But without patent medicines, the same kind of drugs you find in an ordinary drug store. They could fill prescriptions there. I do not know whether they could fill the ordinary prescription of any doctor, or not. We ordered drugs from the different firms at the doctor's suggestion—doctor's orders. We ordered many kinds and had many kinds there. The bills for the drugs would vary. We paid our bills every month. I should say probably the drug bills were \$30 to \$40 a month. Some months they would go more than that. The highest in any one month I sent any firm was \$40, but there were probably three or four firms we were buying from. I could not say positively it was more than \$100 a month. There were many bottles and packages with drugs in. Medicines were sent out to patients. I do not know whether you term them drugs, or not. Whether they were drugs of any value or not, I don't know.

I was not instructed by Dr. Freeman about the writing of any of these letters, and he never gave me any instructions of any kind or nature. He was there frequently and infrequently, sometimes stayed

(Testimony of James T. Burns.)

fifteen minutes and sometimes longer. Frequently he did not come for days. The personal relations between Oesting and Dr. Freeman when I went there first they were not on very good terms. They did not speak. I would not say they were enemies or that they were hostile. All I know is that they did not speak. I noticed they were unfriendly and that Oesting was running the business then, as a rule. Naturally, we took our instructions from Oesting regarding the business end, regarding the conduct of the business. If Mr. Oesting was not there, I could ask Dr. Freeman. I would not take anything upon myself to do. If anything came up that had to be done, if Mr. Oesting was not there, I would ask Dr. Freeman, [144] regarding the payment of money, or something of that kind. After the conduct of the business, the carrying on of it and the treating of the patients, that portion of it I did not consult Dr. Freeman about at all. The only thing I consulted Dr. Freeman about would be in the absence of Mr. Oesting as to the payment of a bill against the company for drugs or services or something of that kind, anything that came up in a business way that I could not handle myself. Rent and bills for supplies and drugs, all those things I would consult Dr. Freeman about when Oesting was not present, but otherwise I did not have anything to do with the management of the business, that is, conducting the treatment of patients.

I found these form letters there when I went there, and was not instructed by Mr. Oesting as to

(Testimony of James T. Burns.)

how to use them. I was instructed by whatever doctor was in charge at the time—I don't know whether Dr. Putnam or Dr. Rice. They told me the formal routine, how it was done by them, and by the former stenographer. If they had any special instructions to give about a letter, those doctors in charge would give them to me. The dividend checks were made out by me in accordance with the instructions that were received at the directors' meetings, and I figured out how much the dividend should be, and made the dividends accordingly, and reported to the board of directors how much money there was and how much of a dividend they should pay. That is practically the way it was after I went there. All of the employees practically got besides their salary a commission. I was not hired by Mr. Oesting. I was hired by Mr. Putnam.

I spoke of the place being closed. It was closed in January, the 8th of January. I did not know the particulars about the place being closed. When it was closed, all of these things were left in it, these books and papers, and there was a lock put on the door. [145] I think Mr. Williams took the keys away—I think he had the keys. I do not think Dr. Freeman had a key at all.

I do not know that for many weeks he tried to get a key and could not get it. After the place was closed, he had a locksmith down there and tried to get in, and evidently he could not get in. I did not know that Mr. Williams was acting in conjunction with the State Board of Medical Examiners. He

(Testimony of James T. Burns.)

was acting for Mr. Williams. He was attorney for Mr. Freeman and Mr. Oesting for a while. Mr. Ward was acting in conjunction with the State Board of Examiners, I believe. He was the attorney for the State Board. I have no knowledge that Mr. Williams was acting in the matter about the closing of the place. Mr. Williams was present, but Mr. Ward was not. He did not tell me what Mr. Ward had said about closing the place. I heard some discussion there. I don't know just when it was that I went back and found the books and papers were not there, but sometime after I went there three or four times. The furniture was taken away about the last time I was up there—the furniture was there the last time I was there. I do not know where it was taken. The detective with the Medical Board of Directors was there once to my knowledge, but not during the conversation.

#### Redirect Examination.

This closing of the place occurred after this indictment. At that time Dr. Freeman and Dr. Oesting hired Mr. Williams and Mr. Choynski as their attorneys, and they were paid jointly out of the funds of the business. At the time the place was closed, *there*, Mr. Williams was the attorney for both of them. He was at the place the day they closed. I do not know about the keys. Williams was then acting as attorney for both Oesting and Dr. Freeman. I kept the books and know the attorneys were paid out of the funds of the concern.



(Testimony of James T. Burns.)

Q. Now, I show you here three papers, and ask you whether or not you have ever seen either of them before?

A. Yes, I think I perhaps wrote that out the other day.

Q. That is Dr. Freeman's signature, is it?

A. Yes, I think it is. I was employed at the place as bookkeeper and cashier at that time. I recognize that as the signature of Dr. Freeman, and this one also. That is so with all three of them.

Q. I offer these in evidence. This is a letter addressed to the State Board of Medical Examiners, Charles B. Pinkham, M. D., Secretary: "This is in reply to your favor of September 23, 1913, in which you call our attention to Section 18 of Senate Bill No. 813 approved and effective August 11, 1913."

(Document marked "United States Exhibit No. 14.")

Mr. PRESTON.—A similar certificate under date of March 17th, 1914, in which it gives G. M. Freeman, M. D., Bellevue Hotel, certificate 1877. C. B. Putnam, M. D., Gough and Hayes, Certificate 1888. E. J. Rice, M. D., Oak and Pierce, Certificate 1899. Signed "G. M. Freeman, and subscribed and sworn to before me this 18th day of March, 1914, John R. Tyrrell, Notary Public in and for the City and County of San Francisco, State of California."

Here is another one under date of November 23, 1914, G. M. Freeman, M. D., Bellevue Hotel, San Francisco, College of Physicians and Surgeons, Baltimore, 1873. Certificate No. 771, January 10,



(Testimony of James T. Burns.)

1877, Medical Society, State of California. E. J. Rice, M. D., 986 Market Street, San Francisco, Medical Department, University of California, May 16, 1899. Certificate issued July 11, 1899, No. 5279. Harry McGarvey, address unknown, chemist. C. B. Putnam, M. D., 986 Market Street, San Francisco, Missouri Medical College, March 6, 1883, License No. 2375. Medical Society State of California, May 7, 1888. Signed G. M. Freeman, M. D., and [147] sworn to before the same notary. This oath is as follows:

“G. M. Freeman, M. D., being duly sworn, on oath deposes and says: That he is and at all times herein mentioned was a resident of the city of San Francisco, county of San Francisco, State of California, and is secretary of Dr. L. J. Jordan, Inc.; that on the 24th day of November, 1914, Dr. L. J. Jordan, Inc., was served with a written demand by the Secretary of the Board of Medical Examiners of the State of California, pursuant to the provisions of Section 18 of an act of the legislature, approved June 2, 1913, and known as the ‘Medical Practice Act’; that within 60 days immediately prior to said 24th day of November, 1914, certain physicians have been associated with and employed by Dr. L. J. Jordan, Inc., in the practice of medicines and surgery, or other system of treatment of the sick or afflicted whose names and addresses and license and authority for practicing medicine or surgery or other treatment of the sick or afflicted are as follows:

(Testimony of James T. Burns.)

(The documents were marked "United States Exhibit No. 15.")

If anything came up regarding the expenditure of money, or something of that kind, I would ask Dr. Freeman something about it in the absence of Mr. Oesting. That did not relate to ordinary things, something out of the ordinary. Dr. Freeman wrote checks or signed checks himself while I was there two or three times. I remember of his signing the rent checks. He may have signed some drug checks.

Dr. Freeman came rather infrequently. He would not say very much to us. He would ask how the business was, or something like that, and he might pass through my part of the building and go in and talk to the doctors. I do not know that he knew of the existence of these stock letters at the time I first went there, but I suppose he did. [148]

Mr. FAIRALL.—I move to strike out the supposition of the witness.

The COURT.—Let it go out.

Mr. PRESTON.—Q. What opportunity did he have to see and know what was going on?

Mr. FAIRALL.—We object to that on the ground that it is immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

A. The same opportunity I did.

These two men began to speak about December, 1913, November or December, 1913. I think that is the first to my knowledge. I saw them in conversa-

(Testimony of James T. Burns.)

tion after that time quite frequently.

I wrote the minutes of these monthly meetings, these dividend meetings, and they were signed by the secretary. There was a meeting once a year. There was no regular monthly meetings. Actually they did not have any special meetings. There was no gathering there, no meeting. I prepared these minutes myself, and would take them in for Dr. Freeman's signature. We had meetings annually, and they were all present then. I was not present at the meeting. I did not make out any reports of the business. At the time of the holding of these annual meetings, the books of the concern were present, but I do not know whether they used those books, or not. They could have. They were in the building and accessible. No special reports were prepared from the different books. Mrs. Freeman was there at the meeting. Addie V. Freeman is the wife of the defendant. I made out a separate check to her as a part of the dividend. Baker is a man connected with the Jesse Moore Hunt Company in the city. He attended some of the meetings, the annual meetings. I did not make out a dividend check to him. No attorney was present at any of these annual meetings. [149]

I was not present at any of the meetings, and could not say that they discussed any of the conditions of the business. The meetings were held in the building, but I was not in the room where they were. The meetings were held in one of the offices of the building. Dr. Freeman may have commented

(Testimony of James T. Burns.)

on the dividend, saying it was rather a small dividend, or something like that, but I do not remember particularly. Dr. Freeman never at any time dissuaded or attempted to dissuade me from attempting to send out any of this literature to my knowledge. Roughly, I should say about 30% of the business was mail order business. That is a rough estimate. I do not remember where this litmus paper was purchased. I do not remember that any was purchased while I was there.

I know some analyses were made of urine, but I do not know whether analyses were made in every case, because that was out of my line entirely and I was not in any way connected with that. I do not know of any that was not analyzed. I suppose they had all the facilities to make chemical analyses. I do not know; that is the only analyses made, chemically. Two or three of the physicians had microscopes of their own there.

#### Recross-examination.

Mr. FAIRALL.—Q. The district attorney asked you if Dr. Freeman ever tried to dissuade you from sending out this literature, and you said no, that you could not remember. So far as you know, he did not know you were sending it out, did he?

A. I suppose he knew what my purpose there was. I was there for the purpose of—

Q. That is only a supposition on your part. You don't know that he knew you were sending it out?

A. He knew I was writing letters. He did not see me mail them; I don't think he knew I mailed



(Testimony of James T. Burns.)

them. They were generally stock letters, not all of them, some of them [150] were personal that I wrote. These letters that were written by the doctors in charge of the cases were by the doctors that looked after them, not Dr. Freeman. I do not know anything about the chemical laboratory. There was so much of a dividend each month, and I wrote up the monthly report in the minute-book, and passed the minute-book later to Dr. Freeman who signed it as secretary, without having a meeting of the board of directors at all.

**Testimony of Fletcher McNutt, for Plaintiff.**

FLETCHER McNUTT, called as a witness on behalf of the United States, after being duly sworn, testified, as follows:

My full name is Fletcher McNutt. I am a general practitioner of medicine, and have been since 1900. I am a graduate of the medical department of Harvard University. I am a member of the Royal College of Surgeons of England. I am engaged in general practice, but most of my work is in genito-urinary diseases, in other words, gonorrhoea and syphilis. My offices are at 135 Stockton Street in this city. I have been practicing here since 1900—two years less. I studied two years after graduation in Europe. I saw some of the correspondence, diagnosis blanks, and letters in these files here, but I did not look over them very carefully.

Referring to "Government's Exhibit 1," wherein the following letter is written to Dr. L. J. Jordan: "I have seen your advertisement, and am writing



(Testimony of Fletcher McNutt.)

to you to know if you have any medicine to restore my lost powers, now that I am eighty years old," to which the reply was made that he was eighty years old, and so on, there is no information on that blank at all that would lead a man to make a diagnosis. A man when he is eighty years old does not feel as well as he used to feel. I would consider a man in that condition, that did not feel as well sexually as he used to feel, absolutely normal, of course, for the age. After reading that [151] diagnosis blank, this question blank, and the other information contained there, I should say this man should need no treatment of any kind whatsoever.

Q. I will ask you whether or not, in your opinion, he would be suffering from any of the diseases I will now read to you: "From the data you sent me, it is my judgment that you have an excess of amorphous urates and phosphates, indicating wasted energy and anaemia neuresthenia, at the expense of some of the functions of the body." I will ask you whether or not the symptoms here set out indicate any of the troubles mentioned there.

A. The amorphous urates and phosphates are normal constituents of the urine, and they will show in the urine; it depends entirely upon the reaction of the urine; if the man has been taking a vegetable diet, it will show; if he has not, it will not show, depending entirely upon the acidity or non-acidity of urine, whether it will show. Amorphous urates and phosphates do not indicate anything. They are present in every man's urine. I would not say they

(Testimony of Fletcher McNutt.)

indicate wasted energy. Certainly they do not. They are normally present in every man. Anaemie is told by an examination of the blood, not of the urine, and neurasthenia is told by talking to the man, questioning the man. Anaemia is a blood disease. Neurasthenia is a nerve disease. It is a nervous exhaustion. The only way you could tell that would be to intimately question the man. You cannot tell anything from this whether or not the patient was capable of producing healthy or unhealthy spermatazoa, not from the urine.

You can tell diabetes if there is sugar in his urine; but you cannot tell anything about diabetes unless you have sugar in your urine. There is no warning of the diabetes at all.

The question is whether there are any symptoms that would [152] warrant a sentence like this, in reply to the patient: "There is no evidence of Bright's Disease or proof of Diabetes, although an overworked kidney may lead to both."

A. That statement is correct, an overworked kidney may lead to both.

Q. What about this statement: "You will find mucuous strings flocculi or sediment in the urine indicating prostatic inflammation at the neck of the bladder with the consequent loss of vitality." Is there anything here to indicate that state of affairs exists?

A. You can find mucous strings in any urine. It does not mean anything.

Considering all things contained in this corre-

(Testimony of Fletcher McNutt.)

spondence, there is nothing that would indicate the man needed treatment at all. Litmus is a kind of a moss that grows on rocks, and it is used in medicine to tell whether a fluid is acid or alkali. Normally the urine of an ordinary human being is acid, depending upon the diet. If you eat asparagus or vegetables for lunch, you will have an alkali, and in the afternoon if you eat meat, you will find acid urine. The presence *or* acid or alkali in the urine does not indicate anything, because it changes probably two or three times a day, the reaction of the urine content. It depends upon the amount of acid salts he takes in; if he takes bicarbonate of soda, or the salts that are in fruits or in vegetables, it will change the reaction of the urine from acid or alkali, and he will be in a normal condition.

Q. Take the second diagnosis I show you. Take a man 25 years old, weighing 185 pounds, 5 feet 11 in height, American, farmer, 10 years' work did not fatigue him, not confined indoors, and dreamed off a few times, not very often; his erections were all right, not too fast or too slow, urinated four or five times daily, and had no trouble, can you say whether or not that man was in a [153] normal or abnormal state of health?

A. I would say that that man was in a perfectly normal condition. A normal man will have these seminal emissions two or three times a month, provided he is young, and provided he has not had intercourse during the time. If Mr. Anson Ashford came to me with the symptoms detailed here, there

(Testimony of Fletcher McNutt.)

would be no diagnosis, and I would tell him to go home. From the symptom blank, there is nothing wrong with the man.

Q. Take the case of Mr. Millspaugh, 54 years old, weight 180 pounds, height 5 feet 11, married 30 years, American, carpenter, employed all his life, able to have sexual intercourse about once a month, intercourse is satisfactory in every way, urinates four times daily, and everything else is all right, stomach, bowels and all the rest, would you say this man was sick or well?

A. I do not see that there was anything wrong with the man at all.

Mr. FAIRALL.—Q. Suppose he was not able to have intercourse more than once a month, a man of his age?

A. There are lots of men at 54 cannot have intercourse at all. You could not do anything for them anyhow. There are no known remedies for loss of manhood.

The tests commonly applied to urine for the purpose of determining what may be determined from an examination of that character in regard to the health or physical condition of the individual are: You would take a reaction, that is, as to whether there is acid or not, with the litmus paper you are speaking of; then you take the specific gravity, considered to be somewhere from ten to fifteen—ten to twenty. The test for albumen indicates Bright's disease, and the test for sugar indicates diabetes. Outside of that, you cannot do much, if anything



(Testimony of Fletcher McNutt.)

at all, with the urine. If you were to put cold tea with a little ammonia and glucose into it and send it to me for examination, I might be able to tell you [154] whether it was urine, or not, if you wanted me to test to find out whether it was, or not. I would test it with hyposulphite of soda. With the ordinary test you cannot tell whether it is urine, or not. Even Dr. Jordan could not tell. It would take a good chemist to tell the difference.

Q. Take the case of a man, Doctor, whose name was George Alberts, living in Tombstone, Arizona, had his express office there, and was 22 years of age and weighed 141 pounds, and his hair was light brown, and so are his eyes, and his height was 5 feet 4 inches, and he was not married and wanted to get married; American nationality, a clerk, and work did not fatigue him; he is confined indoors most of the time, did not dissipate any, had sexual intercourse about once a month, which was satisfactory in every way; his seminal discharges were neither too quick nor too slow, didn't know whether he lost semen or not, his erections were all right, and no loss of sexual power that he knew of; his scrotum hung rather low, no stricture, urinated three or four times a day, and the urine appeared to be light yellow in color, passage was not painful, stomach was good, bowels were good, no piles or pinworms, no inflammation of the rectum, no rupture, no gonorrhoea, no clap and could not call at the office, what would you say, if anything, was the matter with him?

A. There was nothing wrong with him at all. He



(Testimony of Fletcher McNutt.)

would not necessarily be a little weak once a month. I would say as a practicing physician that this man was in no need of medical attention. There is nothing shown to be wrong, so why treat him for something, when he has shown nothing wrong?

Q. Take John Caroway, his age 20 years, weight 150 pounds, height 5 feet 8 inches, black hair, color of eyes blue, not married, American nationality, not working just now, if he did work it would not fatigue him, not confined in bed and did not dissipate in any [155] way. How often do you have sexual intercourse? No much. Is sexual intercourse satisfactory in every way? Yes. Are the seminal discharges (during sexual intercourse) too quick or too slow? No, all right, I guess. Do you lose semen in your urine? Not that I know of. Do you lose semen during movement of bowels? Not that I know of. Do you have emissions of semen at night with or without dreams? Yes, with dreams. Does the semen ever pass from you during the day when you have amorous thoughts or when in the company of women? No. Are you attended by erections? Yes. Are the erections weak? No. Is there any loss of sexual desire or power? A. No. Have your privates wasted or become small? No. Is the prepuce (foreskin) long? Not very. Have you any Varicocele (a knotted condition of the veins in the scrotum or bag)? No. Are the erections strong? Yes. Does the scrotum hang low? No. Is there stricture in the water passage? No. How often do you urinate? Four or five times a day. What is

(Testimony of Fletcher McNutt.)

the appearance of the urine? Light yellow. Is its passage painful? No. What is the condition of your stomach? All right. What is the condition of your bowels? All right. Are you troubled with piles or pinworms? No. No inflammation or soreness of the rectum. Not restless and wakeful at night. Never had gonorrhoea. Never had gleet, never has been under treatment, and could not call at the office. What disease would you say he was suffering from? A. How old is the man?

Q. He was 20 years old.

A. Well, a man 20 might have seminal emissions two or three times a month, which would not hurt him. Certainly such a man would not need treatment. He mentions nothing in his blank there that would lead me to the conclusion that he did need treatment. As to each of the five persons you have described to me, there has not been one symptom that would indicate need of [156] treatment. In regard to the loss of power to perform the act of sexual intercourse, if a man is worn out with age, if he is fifty or sixty and is worn out, you cannot bring it back.

#### Cross-examination.

In the tests of urine, there is a test for acid, a test for sugar, and a test for albumen. If a man patient were to send me a bottle of liquid that looked like urine, without testing it to find out whether it was urine or not, I would assume that it was; and assuming that it was urine, if somebody had dropped a little juice of lemon in it, it would cause an acide

(Testimony of Fletcher McNutt.)

reaction. But it is not the same acid as in urine. That would show on litmus paper. Assuming that someone had dropped a little glucose in it, it would show the reaction, the reaction for sugar. You cannot make a diagnosis for diabetes from urine alone. It is one of the tests. You would have to drop something else in besides salt to raise the specific gravity. You could not raise it high enough with salt. You could raise it with sugar, not with salt. The salt would have some effect on it, but it would not have as much effect as adding the glucose. Anything you put in the urine raises the specific gravity. Flour would not raise it much.

If I had received what was thought to be urine and made the tests and found the result that you speak of, I would be justified in assuming that somebody had doctored the urine and had given me a false sample, or something that was not urine at all. If someone had treated me in that manner, I would think it was rather an unfair test, and I would not feel as though I had been treated fairly as a physician, but the rule in life insurance companies is that any man wanting to be examined for life insurance must pass the urine in the doctor's presence. You take no chances with anybody. Urine that is sent is not accepted at all. He must pass [157] it in the doctor's presence, so there is no substitution of urine. I made the statement that there is no cure for loss of manhood. That is true, according to the best authority. I do not think it is true that a man might believe that he could not have sexual inter-

(Testimony of Fletcher McNutt.)

course, while in truth and in fact he was well equipped and able to have it, if he did not have that belief in his mind that he could not. The mind has something to do with the actual power to complete the sexual act. If a man is healthy he will not have an abnormal mental condition. I do not think that there are many, although they are able to do it, actually believe that they cannot. I do not believe much in Christian Science treatment. What you are talking about is what we call normal sexualism. I have studied that for two years, and all of these people were insane, and they exhibited other symptoms, symptoms of insanity. I do not believe that it is possible for a man absolutely sound in mind and sound in body and able to perform the sexual act, to believe that he cannot and absolutely fails in the act. A man might fall down in the act under fear or under momentary conditions, but it does not become chronic. They do not very often become frightened and see a doctor about whether they are able to perform the act. I have never been consulted by men frequently who said that they were not able to perform the act, but afterwards found they could. There are records of cases of men of strong mind, who failed in that regard, simply because they thought they could not, but they recovered in a week or a month afterwards. They recovered normally and naturally. If I were called to treat a man about fifty years of age, who had a drawn face, with wrinkles across his forehead, a despondent look, and he had an enlarged prostate



(Testimony of Fletcher McNutt.)

gland, and was complaining of loss of manhood and sexual power, I would have to make an examination of him first to find out whether he did or did not [158] need any treatment. If I found an enlarged prostate gland, I would not treat him by medicine. We do not treat them by medicine. We treat that locally. It would depend upon how a doctor treated him whether I would regard the doctor as doing a fraudulent act who did treat him the best he knew how under those conditions. If a man has an enlarged prostate gland, he is naturally sick, but that would not necessarily bring about some loss of sexual power. I have never seen any direct connection between the two. A man does not get any enlarged prostate until after fifty or sixty, and then his sexual power is beginning to decline, anyhow. The enlargement does not cause the decline of the sexual power, but age causes the decline of the sexual power. As the prostate enlarges the sexual power would naturally decline at that age.

**Testimony of Dudley Tait, for Plaintiff.**

DUDLEY TAIT, called as witness on behalf of the United States, after being duly sworn, testified as follows:

My name is Dudley Tait. I am a surgeon. I have made a special study of the genital organs of the human system, rather an extensive study. I have heard the testimony of Dr. McNutt who just preceded me on the stand. I heard you read these various symptoms, and have made an examination of them myself independently of that. I should say



(Testimony of Dudley Tait.)

unqualifiedly that there was nothing in the clinical histories given here to justify a conscientious physician in arriving at a precise diagnosis, and especially in attempting to base a logical therapeutical course of treatment. There is nothing to justify the physician in asserting the presence of anything abnormal. While it is probably impossible to state scientifically what constitutes a normal individual, we recognize clinically or practically abnormalities, and there is nothing which I consider abnormal in the facts or in the answers given in these blanks. There is nothing [159] in medical science by which you can say that there is a rule as to the power of performing sexual intercourse for so many times within a given space of time, because that depends upon two individuals, both of whom might or might not be normal. The number of times he might do it is not sufficient information to arrive at the question of his normality or abnormality.

The dominant note in all of these symptoms is in the direction of a normal function. It would appear to me that these symptoms were drawn to describe a normal man rather than an abnormal man. They are suggestive of a normal individual, an active individual—an active organ, if not an active individual.

Q. What would you say about what treatment, if any, the practitioner in the profession would prescribe for a man say 80 years of age that had lost his sexual power?

A. Well, that depends. I have operated for enlarged prostates at 80 and beyond 80, and they were

(Testimony of Dudley Tait.)

active sexually. If I found a patient who was 80 years of age and was not able to perform the act, I would not prescribe medicine for his condition. I would look into the social surroundings first of all, and examine him. It is not probable that a surgical operation would aid the condition. It is generally for chronic conditions. It is not a sudden act. The fact that a man passed some seminal discharges in his sleep or dreams does not indicate abnormal condition. It is generally the reverse. It indicates an active organ, a healthy organ secretes. A man 54 or 55 years of age, who is able to perform the act of sexual intercourse once a month, would not be in an abnormal state.

I have never seen a physician misled as to whether or not a given fluid is or is not urine, if the series of tests that were employed were up to date. In hospitals, or still further in universities, we naturally set a standard which would eliminate all [160] such possibility of error. We rely principally upon the microscopic examination, without which no analysis of urine is certain. Take the solution here of a little ammonia, a little glucose, a little water and tea leaves, the microscopic examination would reveal the general absence of any urinary elements. Some of the urinary elements are, a portion of the urinary tract matter, ureter, urethre, kidney substances and various crystals. There is a secretion of tissues. All the tissues are renewed in the body, always changing. A superficial examination by an interne in any hospital would reveal that that was not urine.

(Testimony of Dudley Tait.)

If a man pronounced it urine when it was not, it would certainly show he was not qualified to practice medicine.

Q. Is there any other medical side to this medical question that we have mentioned upon which you would give us any information as to whether or not this case is one of a *bona fide* attempt to treat a real disease?

A. No, except as I have already said. The evidence tends to prove it only as normal as we would expect. Apparently that is true of each of these five cases. The evidence offered does not prove anything abnormal. I would not attempt to make a diagnosis on such flimsy evidence. As far as I could tell there would be nothing abnormal—no justification for having a physician.

#### Cross-examination.

There are times when men naturally lose their sexual powers. That depends upon the age of the individual. I would place in order of prevalence fatigue, fright, fear of disease, for instance, which is evidently akin to fright, and different physical diseases, local or general. I mean both fright at the very time of the attempted sexual act, or fright covering a period preceding it. Any acute disease would contribute to that loss, anything involving, [161] for instance, any infection of the urinary tract causing pain. The most frequent cause is gonorrhoea, acute infection of the urinary tract. Acute gonorrhoea sometimes brings about this loss of sexual power, and that, of course, is naturally fear, on

(Testimony of Dudley Tait.)

account of the pain. Gonorrhoea may be a chronic cause by extensive involvement of the sexual tract. That is extremely rare, because nature has been very free in this allowance of a very large amount of tissue, and does not take much substance to carry on that function. You may lose 98% of it and still have enough. Syphilis may bring about that result, but that is extremely rare. Chancroids never do it. The effects resulting from chancroids seldom give rise to that condition. Tumors do not, unless they are very extensive. A patient suffering from stone in the bladder, or tumor in the bladder may be in that condition, but these are very exceptional conditions. Not necessarily an enlarged prostate will produce that condition. The prostate gland is generally the hyperfunctional gland of a man who generally oversteps the mark. It is the frequent intercourse which gives rise to congestion, it leads to his state of quiescence. The complications of gonorrhoea might cause that loss of power. I have already alluded to those; atrophy, that is, the wasting of the organs, that is one of the complications I have already mentioned. Outside of that, with the exception of very rare cases, I think I have covered the ground. Gonorrhoea is the most frequent cause of the wasting of the organs. Masturbation would tend to increase the function; the effect of masturbation has been greatly abused by the uneducated physician. I mean to say, in the results. They have made a rather dark picture of its results, and their findings have never been verified. They have



(Testimony of Dudley Tait.)

simply told an untruth. In the majority of cases, the patient knows that he is unable to perform a sexual act. If the [162] patient is suffering from an acute condition, from an infection, the pain is real, and it is not imaginary. I have never seen a chronic condition brought about by masturbation. I am not referring to conditions that lead to masturbation, but I am referring to abnormal conditions due to masturbation. Insanity is not due to masturbation. In other words, masturbation in young boys has been grossly exaggerated as to its consequences, and the presence of abnormalities, anatomical, psychological or pathological following masturbation are very much overdrawn.

I have already indicated in answer to question, that that power is due, or comes, rather, from, first, the individual, and secondly, the conditions surrounding that individual; both factors are equally important. You cannot discuss one without the other. It may occur that a man is in good health and sound and able physically to perform the sexual act, but not able by reason of a mental condition brought about by his belief that he cannot, but I have not seen such cases. I do not wish to minimize the psychological factor that is present sometimes. The influence of the mind on the body cannot be ignored by any modern physician, and that should not be excluded; that might apply to exceptional cases. A doctor sometimes treats that condition of mind, which may bring about an absolute cure in the patient. A doctor may be called upon in temporary disability



(Testimony of Dudley Tait.)

to act as an adviser along those lines. In other words, give the patient confidence and hope and belief of his ultimate recovery. That may occur after a severe illness, for instance, a condition of fatigue; a man may need advice along those lines, purely mental, but never therapeutical; neither medicine nor surgery. There is a difference between a psychological condition and an actual disease. Very often you find a psychological condition arising in your practice in the treatment [163] of patients, but not along these lines. I have already said that if those very rare possible cases of temporary disability a few words of kindness might be necessary in order to rid the patient's mind of fear as to the presence of anything abnormal.

#### Redirect Examination.

Mr. PRESTON.—I will ask you whether or not you would consider it an application of what you call a mental suggestion of absent treatment to say to a patient something like this: "I presume you are suffering with some ailment that you do not understand, and from which you desire relief. A knowledge of sexual hygiene, self and sex and their relation to life and health, diseases of life-giving organs, vicious practices and their results and sequels, do not come intelligently of themselves, nor correctly from ordinary, every-day sources, nor by the advice of ignorant friends. I am sure you wish to make a name for yourself; you do not want to be a failure before your time. You wish vigor and stamina in order to overcome the difficulties you meet in the

(Testimony of Dudley Tait.)

battle for existence. To do this, you must not be handicapped by weak organs. You must be strong in the loins, and gird them up, as directed in the Good Book. No chain is stronger than its weakest link. Ships in storms are at the mercy of the weakest bolt. Self-pity and the demon of discontent, the weight that holds thousands back, is caused by ill-health of one or more of the vital functions. No matter who you are, no matter how much money you have, no matter if you are able to pay cash, no matter if you must have terms, no matter what the conditions, you cannot afford to neglect yourself. Self-preservation is the first law of nature. This relates to your health, as well as fighting to defend your life, or the life and health of your offspring."

Another one is as follows: "This is in reply of yours of recent date. The chemical test papers and question blank were [164] carefully and scientifically considered. From this data it is my judgment that you have an excess of amorphous urates and phosphates, indicating wasted energy, anaemia, neuresthenia at the expense of some of the functions of the body. You require and demand treatment to place you on par with your fellow-men. You will find the testicles are weak and flabby, and are not manufacturing healthy spermatozoa. There is no evidence of Bright's disease or proof of diabetes, although an overworked kidney may lead to both. You will find mucuous strings, flocculi, or sediment in the urine, indicating prostatic inflammation at the neck of the bladder, with the consequent loss of

(Testimony of Dudley Tait.)

vitality and absence of complete sexual satisfaction absolutely required by all male animals of health. Your case is a complicated one, requiring careful and scientific treatment on the part of any physician who takes upon himself the responsibility of treating you. If you give your case into my hands, I must have honest co-operation on your part, following to the letter my instructions."

I will ask you whether or not such matter as I have read you would be calculated, in your opinion, to brighten up the individual and raise his hopes of a cure?

A. It certainly would not. Judging from what is the accepted standard of the practice of medicine to-day, such teaching is not only unwarranted and dangerous, but it would be considered criminal.

Q. Now, in regard to this question of giving the patient a little pat on the back by way of encouragement, that would not be done in chronic cases?

A. It is not called for. There is nothing about this to show, to my mind, that it was a *bona fide* attempt to treat either of these parties.

#### Recross-examination.

Mr. FAIRALL.—When you say "criminal," you do not mean that which violates any law of the land. You speak of criminal as the [165] layman sometimes does, as highly reprehensible and conduct such as should be condemned?

A. No. I refer to the ethics of the medical profession, and I think that any doctor belonging to the smallest medical society would surely lose his mem-

(Testimony of Dudley Tait.)

bership if such documents were presented before the board of directors of that society; that I am certain of, absolutely certain of, in any county or any city in this country.

Q. You would require proof that the doctor sending it out had knowledge of it?

A. I am considering this as evidence. If such evidence were placed before the board of directors.

#### Redirect Examination.

Mr. PRESTON.—Q. I will ask you what would be the effect upon the ordinary layman to read or have read to him a letter such as the one I have just last read to you?

A. I do not think I am exaggerating when I am saying in the extreme it might be suicidal. The ordinary individual would not be capable of gaining anything from that excepting a scare.

#### **Testimony of Harry McGarvey, for Plaintiff.**

HARRY MCGARVEY, called as a witness on behalf of the United States, after being duly sworn, testified as follows:

My name is Harry C. McGarvey. I am a graduate of medicine and licensed to practice in this State. I have been licensed last December. Have been licensed in the State of Ohio since 1897, and have been in San Francisco, or on the coast, one year. I came here in 1914, and during that year was employed at the place of Dr. L. J. Jordan—the place known as Dr. L. J. Jordan, Incorporated. I was not admitted to practice medicine in this State at the time I was employed there. I obtained the information



(Testimony of Harry McGarvey.)

that led me to go there for employment from a newspaper advertisement. I got the facts leading up to my employment from Mr. Paul Oesting. I know the defendant here. He was at the institution while I was there. He [166] would appear there during the day, usually once a day, sometimes twice a day, and sometimes he would not be there for two or three days. I understood that was his headquarters. He did not have any special office at the place. There was a desk there where he got his mail. Mail was received there for him. There was museum in connection with this place at that time. Also a reception-room, private office, two consultation-rooms, a drug-room and a small operating-room. Dr. Rice was in attendance besides Dr. Freeman at the time I was there. I was hired as an assistant to do such work as a male nurse would do, and do laboratory work. I was under the supervision of Dr. Rice. I quit my employment there about the middle of last October, having been there about six months. At the time I was employed there I had been practicing medicine in Ohio continuously for fifteen years. The facilities that were there at this institution during the six months I was there for an examination of urine were—there was litmus paper, a hydrometer for determining the quantity of analysis, and test tubes. There was no microscopical instrument. The microscopical instruments usually used in an analysis of urine are those that have a magnifying power of 600 times, 300 to 600 times is the usual lens used; then they have for close bacteriological work,



(Testimony of Harry McGarvey.)

one that will magnify 1200 times. There were no such instruments there—no microscopes there at all; no other instruments that would fill the place of a microscope to my knowledge. During the six months I was there, urine came in through the mail or otherwise for the purpose of examination. During the time I was there, no microscopical examinations were made of urine, to the best of my knowledge. Quite often there was no test whatever made of urine. The urine was thrown in the tank. I have heard that referred to as a carpet test. There were sold at that place during the time I [167] was there appliances or instruments supposed to be useful to mankind. There was a so-called penal developer and electric belt or apparatus that was worn around the body. The effect of the penal developer on the patient was principally psychological. The constant use of such an instrument had a tendency to engorge the organ and weaken the walls of the blood vessels of the parts, and certainly no beneficial result came with it. It is a fact that it would have a penal effect to a certain extent. That instrument sold for whatever they could get for it. I know one that was sold for \$50. The lowest price I know one sold for was \$25 I think. The instrument that sold for \$50 and \$25 was the same thing. This other appliance I spoke of was a belt composed of a number of copper discs enclosed in a covering of felt and silk, which went about the body and about the parts. Its effect was supposed to be electric, stimulating on the nerves—supposed to be a nerve tonic. In my opinion, it did not have any such effect.

(Testimony of Harry McGarvey.)

The efficacy or nonefficacy of such instrument was discussed in the institution while I was there a number of times. I never talked to the defendant in regard to them.

Mr. FAIRALL.—It does seem to me that in order to show a scheme to defraud, they must show there was a scheme to get money by means of fraud; that the defendant knew that the means were fraudulent and had no belief in their efficacy as medicines, and that he was actually engaged in an attempt to gain money in a fraudulent way.

The COURT.—The objection will be overruled.

Mr. FAIRALL.—Exception.

It was discussed by Dr. Rice and myself. I think we both concurred in the opinion that they were not very efficient.

Q. Did you ever talk to Mr. Oesting about it?

Mr. FAIRALL.—We object to that upon the ground he is not a [168] defendant here and is not under indictment and was excluded from the indictment.

The COURT.—The objection is overruled.

Mr. FAIRALL.—Exception.

Mr. PRESTON.—Q. Did you ever discuss with Paul Oesting, the president of this company, any question as to whether or not this institution was a *bona fide* one for the purpose of legitimately curing the ills of mankind

A. Yes, that was very thoroughly discussed before I connected myself with the institution. I was given to understand at that time that it was a *bona*

(Testimony of Harry McGarvey.)

*fide* specialist's office, and that they were doing a straight legitimate business; inasmuch as they were the only ones in the city that were open and running, it lent some credence to my way of thinking that he was telling the truth.

Q. Did you change that view?

Mr. FAIRALL.—We object to that as immaterial.

Mr. PRESTON.—I am not asking whether you changed your views, but I am asking whether Paul Oesting ever gave you any other information on the subject afterwards?

The COURT.—Objection overruled.

A. No, it was not necessary.

Q. Take the question of blood tests. Did you have any instrument there suitable for blood tests?

Mr. FAIRALL.—We object to the testimony as to blood tests upon the ground that there is no evidence here of any patient suffering from anything which would require blood tests, and if any blood test was ever taken or necessary to be taken—

The COURT.—The objection will be overruled.

Mr. FAIRALL.—Exception.

A. The only instrument for making a blood test was a little book filled with squares of blotting paper, and in the back of this paper there is a scale graduated in colors in such a way that it [169] gives you the percentage of hemoglobin in the blood, that is, in anaemia, of course the percentage of hemoglobin in the blood is low, while in a healthy rich-blooded person the percentage of hemoglobin is high. That was the only blood test in the institution.

(Testimony of Harry McGarvey.)

The ordinary instruments used for that purpose in the common practice of medicine are—in the first place, it is necessary to have necessary flasks and test tubes and centrifuges for separating the blood cells from the blood semen, and then a microscopic outfit for preparing slides, and sufficient equipment to properly examine these specimens minutely with a microscope. I know of a case where they took a specimen of blood from a patient and told them they had examined it when they had not. That was along during last August, the first of August.

Mr. FAIRALL.—We object to that upon the ground it is not within the time of the indictment, but is after the indictment.

The COURT.—The objection is sustained.

I knew of a substitute being made of water and some other substance of no medical properties in the place of *bona fide* serum for the purpose of injection.

Q. When was that?

Mr. FAIRALL.—This witness was not connected with the institution at the time mentioned in the indictment. On the question of similar offense, they never introduce evidence of offenses committed after the main offense.

The COURT.—If you had made an objection on that ground, it would have been sustained.

Mr. FAIRALL.—I make that objection, and ask that this testimony be stricken out.

The COURT.—The objection as an objection comes too late. The objection as made is sustained. The motion to strike out is denied.



(Testimony of Harry McGarvey.)

Mr. FAIRALL.—Exception. [170]

A. That was going on practically all the time during my connection with it.

Cross-examination.

In taking blood tests, if a physician is not properly equipped to do it himself, it is usual to send the blood out to a laboratory to have the test made. I am not equipped to make a Wasserman test. I would have to send blood out for such a test. That is a test for syphilis. For a test for Diabetes, I would not send that out. I would do it myself. For blood pressure we have an instrument for measuring that in our office. There are some men in town who are specialists in that and who sometimes get that work from all physicians. There are several in this town who are specialists on blood work and do that kind of work only. It is usual for physicians, even though they are high class physicians, to send that kind of work to laboratories that are equipped for doing the work. It requires quite an equipment and education to do it, a special education along that line. They are increasing their knowledge every day upon that question and men are becoming more expert in those lines every day. In regard to the old style way of treating patients by the physician doing the whole thing himself, they have various facilities or assistants that they can avail themselves of. The up-to-date physician, if he wants anything special done, sends it out. If he wants an X-ray photograph he sends for that. I would not necessarily be surprised if a man were a good physician and doing an



(Testimony of Harry McGarvey.)

honest practice, to see that his office did not have all these test tubes and methods of testing blood.

I never know of the Wasserman test being made there. I never saw a record they kept of Wasserman tests. I was only an assistant and did not attend to practice medicine. I was refused a certificate [171] by the State Board of Medical Examiners, while I was there, and after I left there I got a certificate after taking another examination. I did not get one on my first examination while I was connected with Jordan. After I left there, I did not take a list of the names of patients and did not advertise for patients that had been going to Jordan's Museum—no advertisement of that kind, nor did I send out any circulars, to patients who had formerly been there. There were a few of the patients that I knew I wrote personal letters to. I wrote to them stating that I was no longer connected with Jordan, but was practicing for myself. I do not know as I made any such statement as that I had found out that Jordan was not a reputable place, and that I would give them a better treatment. I did not say that I had learned that Jordan's was not a reputable place. I think at that time the institution was closed. I said that the place was closed, and that I was prepared to treat people.

Q. Did you consider that highly professional?

Mr. PRESTON.—To which we object—

The COURT.—The objection will be sustained.

Mr. FAIRALL.—We except.

I have no great friendship for the people connected

(Testimony of Harry McGarvey.)

with Jordan's, not specially. I do not know that I have a little feeling against them. I do not love any of them particularly any more than I would you or anybody else; there is not any particular enmity, as far as I know, no reason for it.

#### Redirect Examination.

There were tubes that came from the Wasserman laboratory in the office. On one or two occasions that I know of, those tubes were filled with blood, and to my knowledge were never sent out.

#### Recross-examination.

The effect of the penal instrument that was sent out was to [172] enlarge the parts and engorge the veins during the time it was used. I knew that it would do harm. I did not send it out. I had nothing to do with the matter. They were sent out for the purpose they were made, I presume. That is a natural supposition. The purpose for which the instrument was made would naturally be disclosed by the instrument itself. I do not know as it stated it would injure the person. I have seen them tried, but I do not know that I ever saw one used in that place.

I have never been in this business of selling that instrument before. I have seen the instrument before, but I never used one in my life in my business. I know the effect of it from my judgment, observation and knowledge. I never saw a patient wearing one. I saw a man that had used one for a month or two at this institution. I never saw him use it there; he took it home with him and used it at home

(Testimony of Harry McGarvey.)

Recross-examination.

The tincture of iron would be used as an astringent. It is a tonic, a blood tonic. It is a general tonic, and is not necessarily used to tone up the system and strengthen the organs of generation. To my knowledge, it has not the effect of strengthening a man's sexual desire. I do not believe that. I do not see how it could have that effect. It would not encourage the secretion of semen, to my knowledge. It increases the hemoglobin in the blood cells, when it is absorbed into the system. Hemoglobin is the coloring matter in the blood, corpuscles that give us the color; it is the oxidizing property of the blood, the property of the blood cell which carries the oxygen, and a composition of iron chemically administered to a patient, if absorbed, is taken up and forms hemoglobin and adds to the coloring or red matter in the blood corpuscles. It increases its oxygen-carrying power, and in that manner brings about a general building up of the blood. To a certain extent, that would result in strengthening the sexual organs. To my knowledge, it is not given for that particular purpose.

The rheumatism was located in his shoulders, arms, I believe. It was not in his back. He always complains of trouble in his arm and shoulder. I did not examine to start with. I examined him afterwards and treated him, but during the time he was coming to the Jordan institution, I simply followed the instructions of Dr. Rice in regard to his treat-

(Testimony of Harry McGarvey.)

ment. I do not mean to say that the medicines prescribed would not be of any benefit for his rheumatism. They would be of benefit to him. The remedy I mentioned is one that is used in the treatment of rheumatism, usually used. He had muscular rheumatism, what is known as that. He was able to [175] walk about when I found him. He complained of the rheumatism bothering him considerably. I could not say that he improved any afterwards. Sometimes when he called he said he was feeling better, other times he said he was not so well. Eventually I prescribed different treatments for him. To the best of my knowledge, I treated him honestly and give him the best treatment I could. I was acting in good faith with him. So far as I know, Dr. Rice was acting in good faith with him, so in that particular case, there was no fraud as far as I know.

**Testimony of A. J. McDonald, for Plaintiff.**

A. J. McDONALD, called as a witness on behalf of the United States, after being duly sworn, testified as follows:

My name is A. J. McDonald. I know the defendant here. I am inspector for the Board of Medical Examiners. I heard this doctor defendant make a statement before the Police Commission of this city with regard to who Dr. Jordan was in December, 1913. In answer to a question that he was asked, the question was, if a patient should call at the institution and ask for Dr. Jordan, what would you



(Testimony of A. J. McDonald.)

say? I am the doctor—that was the answer. I heard him make a similar statement before the Board of Medical Examiners, about that. He was asked the question, and he answered Yes. That was this present month. He told me on another occasion that he had been connected with the Jordan Museum for about fifteen years, and that it had cost him \$10,000.

Cross-examination.

I have charge of investigating for the State Board of Examiners in the northern part of the State, looking up evidence, and remembering the statements that are made in my presence and testifying to them in court. It is not my general duty to secure convictions where I can under the instructions of the Board. The secretary [176] never gives me any orders, with the exception of saying that this man is a violator or this man ought to be looked up. When he tells me the man is a violator and to go out and look him up, my purpose is to investigate and find out if he is violating the law, or not. Whether or not he is tried before the State Board of Medical Examiners depends upon whether it is a violation of the medical practice act, or in regard to professional conduct. We have never brought any doctor into a federal court. We sometimes prosecute them in the state courts. I try and remember things I hear in regard to statements and so on, conversations. The defendant was before the police commissioners, and the proposition was the action of the board trying to have the license revoked, the license of the Jordan



(Testimony of A. J. McDonald.)

Museum. On that application to revoke the license, they had Dr. Freeman there to testify. In answer to a question if a patient should call at the museum and ask for Dr. Jordan, what would you say? Dr. Freeman answered, "I am the doctor." In charge of the museum, or Dr. Jordan—that was not mentioned. Afterwards before the State Board of Medical Examiners he admitted that he did make that statement before the Police Commission. I recently had him before the State Board on an application to revoke his license. They took this little red book, that has been out fifty years. The evidence was that he was doing illegal advertising by means of that book. I looked after the case to a certain extent. The Jordan Museum has been under investigation ever since I have been with the Board, until it was closed. The proceedings of the State Board were taken against doctors who were there, who were practicing medicine. The doctors were the only ones that the Board had jurisdiction over. We are after anyone who is violating the medical act. Paul Oesting is not practicing medicine. We are after him the same as anybody else. No proceedings have [177] been brought against him. The Board of Medical Examiners has no jurisdiction over a person who is not a licensed physician, in regard to revoking a license, but if they are practicing medicine without a license, they would be prosecuted for that offense. We have made attempts to prosecute Paul Oesting since I have been with the Board, and every one else that has violated.

(Testimony of A. J. McDonald.)

To the best of my knowledge, Choynski and Williams were representing Paul Oesting at the time I was investigating him. The only consultations with lawyers that were representing Oesting in regard to the Jordan place that I can remember, is in regard to Dr. Rice's license. Mr. Williams spoke to me about Dr. Rice having a wife and child, and that we ought to try and give him a chance. I was after Dr. Freeman, each and every doctor that was in the place, Dr. Putnam also.

Q. Did you have frequent consultations with these attorneys as to what you should do?

Mr. PRESTON.—We object upon the ground that the cross-examination has gone far afield.

The COURT.—The objection is sustained.

Mr. FAIRALL.—Exception.

Mr. FAIRALL.—Q. Did you have any understanding or arrangement whereby Oesting was not to be prosecuted if he furnished you information against the defendant?

A. None whatever. I would just as soon prosecute him as anyone.

Q. Did he furnish you any information?

Mr. PRESTON.—To which we object.

The COURT.—The objection is sustained.

Mr. FAIRALL.—Exception.

**Testimony of William C. White, for Plaintiff.**

WILLIAM C. WHITE, called as a witness on behalf of the United States, after being duly sworn, testified as follows:

(Testimony of William C. White.)

My name is William C. White. I am employed at the Jordan Museum [178] or the L. J. Jordan place, in this city, first in April, 1909, and remained there on that occasion until the first of November of the same year. I was subsequently re-employed in November, 1913, and stayed there until the first of January, 1915. My duties were the same at each employment, that of janitor. "Janitor" comprised in my work, keeping things clean and taking care of the museum and relieving the manager during his time off. Mr. Robinson, during the time I was there, was the manager. His general duties were, he had general supervision over the whole thing, I suppose, over the whole outfit. There was a reception room there.

Q. What information did you give to the patient asking for Dr. Jordan?

A. We evaded the question. I asked them if they wanted to see the doctor, and if they asked for Dr. Jordan, I would not say anything, but just take them into the reception room. We did not come right out and tell them whether Dr. Jordan was there, or not. We would say to a patient wanting to know about Dr. Jordan that the doctor would be available in a moment—the doctor that was on duty.

The doctor who was in charge when I first went there was Dr. Lopp. I did not give any other information to patients in regard to who Dr. Jordan was. I never described Dr. Jordan to the patients.

Q. How often did it occur during the first time

(Testimony of William C. White.)

you were there that you would have patients or persons inquire for Dr. Jordan when you would tell them he would be in in a minute, and send him to the doctor in charge?

A. It might occur once a day. I was not on only during the meal hour.

Q. Did or not this same system obtain under your second employment?

Mr. FAIRALL.—We object to that.

The COURT.—The objection will be overruled.

Mr. FAIRALL.—Exception. [179]

A. I never received any instructions in regard to that matter, but I pursued the same policy. I never came out point blank and said to a patient, "This is Dr. Jordan." We used to say, "This is the doctor." Dr. Oesting said one day we were all Dr. Jordans. Oesting never had anything to do with the patients. I cannot remember during my first employment of Dr. Freeman answering the call of Dr. Jordan. I don't think Dr. Freeman showed any activity in the management of the business when I first went there. He and Dr. Oesting were not friendly at that time. They were not friendly as long as I was there. He would come in and stay a while and go out. He would not make any inquiry about the business of me, nor would I have any discussions with him of any kind. Dr. Freeman hired me the first time, and Dr. Robinson the second time. Dr. Freeman instructed me in regard to my duties the first time, and told me to keep the place clean and relieve the manager. I had nothing to do with sending out mail



(Testimony of William C. White.)

matter nor do I know that mail matter was sent out. I suppose I know something about a patient by the name of Murray, although that was not the name on the case sheet. The name was J. W. Wilson. That patient was there in November or December of 1913 or 1914. It was when I went there the second time. That would be the fall of 1913. I had access to the case cards governing his case. I know what was on them. The date of his visit and the date that he came there to take treatments were on the card case. I think it was just prior to the time I went there. I am not sure. I have seen Dr. Freeman in conversation with other members while I was there. I have seen him in the office with them. The patients would not be there then, not as a rule. I have seen him there when a conversation with a patient was going on.

I got my employment there first through an employment agent and the second time they came after me. During my first employment [180] at the institution, I saw what disposition was made there of urine that would come in packages through the mail. It was always thrown in the waste basket, and I took them out and threw them in the swill bucket. They were sometimes taken out of the package but sometimes not. The bottle itself was not uncorked or unsealed, in the original package, thrown away, considerable of it every day, more or less.

#### Cross-examination.

The physician threw it away, the physicians in charge of the case.



**Testimony of L. F. Kebler, for Plaintiff.**

L. F. KEBLER, called as a witness on behalf of the United States, after being duly sworn, testified as follows:

My name is Dr. L. F. Kebler. I am chief of the drug division, Bureau of Chemistry, United States Department of Agriculture at Washington, D. C. I examine urine quite frequently. It comes up as a question of medical practice. We have been doing work in co-operation with the postoffice department for the last ten years. This kind of work is often assigned to me. I have been called in on cases of this kind from time to time. I am not the author of the kind of urine that is in evidence here. In ordinary practice, a microscopical examination of urine is the method of testing its properties. I always employ that in an examination of urine. There is no doubt whatever but that I can take a bottle of water and a few tea leaves, a little glucose, and give it a microscopic test and tell whether it is urine, or not. A chemical test would reveal the fact that it is or is not urine, also. I do not quite agree entirely with some of the physicians who have testified here. I give as my reason for saying that a chemical test will tell whether or not it is urine is, that there is no other substance that has [181] the same properties that urine has. I could even tell the difference by a chemical test. In the agricultural department, we have a supply of litmus paper. The only purpose to which litmus paper is put in medical work is to determine whether or not a given sub-

(Testimony of L. F. Kebler.)

stance is acid, that is, sour, or alkali. That is all. When a man has dipped litmus paper in urine and forwarded it to a doctor, that of itself does not disclose any information upon which the doctor could intelligently prescribe for the patient.

Q. Why not?

Mr. FAIRALL.—We object to that upon the ground that that alone is not all for the prescribing physician in this case. It does not fairly embody any of the cases that are before the court.

The COURT.—The objection is overruled.

Mr. FAIRALL.—Exception.

A. Lime water, lime juice, lemon juice, orange juice, will all give an acid reaction; vinegar will give an acid reaction. The lye taken from ashes will give an alkaline reaction. There are thousands of substances that will give an acid reaction, and it simply changes the color of the paper from say a blue to a red, with acid, and very red to blue with alkaline; that is all there is to it. There is nothing on the litmus that could be used as a basis for making any diagnosis whatever. I have read the various symptoms of these supposed patients here. I have heard all the testimony in the case. I agree with the opinions of Dr. Tait and Dr. McNutt that sufficient information is not disclosed here to tell what is the matter with these people, or whether there is anything the matter. Amorphous urates and phosphates are uncrystallized bodies. All urine contains phosphates and urates. That to a physician does not mean anything. [182]

(Testimony of L. F. Kebler.)

Cross-examination.

I am a physician. I graduated from the University of Michigan in 1890, and finished my work later on in charge of Washington University, and I have never practiced—I have practiced medicine but not as a regular practitioner. I am a physician and chemist, my work being chemistry chiefly. I practice medicine in Washington, D. C., in the Department of Agriculture. I am one of the physicians that has charge of the cases that come up in the Department of Agriculture. I practice on human beings in the Agricultural Department. These cases arise by accident, smallpox, scarlet fever, and all things of that kind. Occasionally, surgical cases come up. We have some black people down there that are liable to carry smallpox or other epidemic diseases. I have not treated urinary troubles or venereal diseases. That is not in my line. I am an expert on the analysis of urine. That is a chemical analysis, I consider. I speak of urine from a truly scientific standpoint, as a man who is making a chemical and exact analysis of it. My analyses of urine were made for the purpose of determining whether or not the urine is normal or abnormal, not for the purpose of determining its value as a fertilizer, or something of that kind. To ascertain whether it was normal or abnormal, pathologically, in cases of Bright's disease, diabetes, rheumatism, and all things of that character. Physicians do not submit samples of urine to me for a chemical analysis, nor do I ordinarily get them from physicians. I

(Testimony of L. F. Kebler.)

get them from the postoffice department in my capacity as chemist. I do not think there is such a big range between chemists and physicians; I am educated in both schools. I understand there is a difference. In an examination of urine, if there is no sediment there, the microscopic examination cannot be made, as was the case in one of the urines that I examined for the postoffice department, when it was alkaline and had no sediment, [183] and that would lead you to believe immediately that it was not genuine urine. If it was acid or might not have sediment, it yet might be urine. By dropping a few drops of lemon juice in some water, a liquid might be produced which showed no sediment, and which might be assumed to be urine for the purpose of the examination. Litmus paper has no value at all, so far as making any diagnosis is concerned. Litmus is of value in the stomach content. It is quite important to know whether the condition of the stomach is acid or alkaline, whether it may be cancer, if it is one thing; it may be ulcers, if it is another. It has some value there. It has no value in any test which might effect the urine. I can think of none. The same man during the course of twenty-four hours, in absolutely normal health, will pass urine that is alkaline one time and acid another. That is not true of the stomach condition also. The normal stomach is never alkaline, always acid. I have never examined a stomach that was alkaline, pathologically or otherwise. The taking of bicarbonate of soda



(Testimony of L. F. Kebler.)

into the stomach would make an alkaline condition momentarily and overcome the acid. It would have the effect of neutralizing the acid.

Urine has properties which no other liquid has. There is no way of producing any liquid which would carry the same properties as urine, that I know of. I have at the request of the postoffice department tried to put the same properties that are in urine into clean water to imitate urine, but I have been unable to do it. I could not take some of the secretions from the kidneys or other parts of the body and make a urine imitation. Urine has a distinctive *characteristic* odor which everybody that has come in contact with it, recognizes almost immediately. It might vary with the food that is eaten or the liquid that is drank. In the second place, urine has a substance *known urea*, which no other substance [184] can produce. Urea can be produced chemically, but the peculiar odor I have never seen reproduced. Some foods produce a very highly offensive odor in the urine, or some liquid, and others no offensive odor at all. For instance, asparagus causes a sickening-like odor. We cannot reproduce those odors with anything known to chemistry. I think that is impossible, to the chemical world in general.

If I were a physician and prescribing for a patient and the patient sent me what he claimed was a sample of his urine, I would assume it was urine until I had proved it to the contrary by both chemical and



(Testimony of L. F. Kebler.)

microscopical examination. I would always submit it to that examination. I say that by reason of my chemical experience as well as my experience as a physician. My experience as a physician has shown that patients will give plain water instead of urine for examination. I have known that to be done. That is in cases where they had something to gain, like life insurance. But in the ordinary cases of treatment of diseases, I do not find the rule that patients will send you water instead of urine for examination. I would never pronounce a substance urine until I had examined it and found it was urine. I would not act on it as urine. I would not discredit the statement of the patient, but I would always examine it. The examination necessary to determine that it is urine is purely for the examination of the urine. If I was given a sample of urine, I would take the specific gravity, take the odor, smell, it, determine the amount of urea in it. I would test it for the presence of sugar, albumen, test it with a microscope for urates, either precipitated or otherwise oxidated, phosphates, mucous material, epithelia. The microscope will reveal almost everything that I have mentioned here excepting the sugar and the albumen. To test for sugar, we make what we know [185] as a boiling solution, heated up to boiling *to boiling*, and then put in a drop of the urine, and if there is sugar present, there will be a distinct reaction, which is known to us all, characteristic of sugar in the urine. Water with glucose in it would produce that effect, but not with sugar. With sugar,

(Testimony of L. F. Kebler.)

such as they had in one of these samples, that would produce that effect. To discover the specific gravity, I usually use what is called the pycnometer, a little apparatus for that purpose. It is what is known as the pycnometer, or the specific gravity spindle—you just drop it in. That would disclose the specific gravity. The specific gravity of normal healthy urine varies from .1015 to .1024. If some substance is put in water that would raise the specific gravity to that point—glucose might do it, salt would do it. For testing albumen, I would apply the white nitric acid contact test, which consists in putting a small quantity of urine in a test tube, heating it, and then putting a layer of nitric acid under the heated urine; at the point of contact between these two liquids, there will be disclosed a zone or white opalescence, if there is albumen present; if there is a material amount of albumen present, it is only necessary to heat the urine. You can see it with the naked eye. Albumen is a chemical substance which the white of the egg is representative of. Some of the substances that will make albumen are, albumen in eggs, in beans, wheat and potatoes. A little library paste would not produce albumen. That is made of starch, chiefly. That is a substance which does not respond to that albumen test at all. It is albumen of an entirely different type. Library paste has starch in it, and I suppose it has some dextrine in it. It would also have a little mucilage. I have tried it out, and as a matter of fact, it does not produce the condition of albumen. I made that test at Washington, D. C., [186]

(Testimony of L. F. Kebler.)

I did not direct what should be placed in this water. The only substances that I know of that produce actual albumen by putting in water are the white of an egg, the serum from blood. Nothing else will produce it that I know of. There is nothing in the library paste that will give any reaction for albumen in any form. It would have no effect at all, except to change the color, give it the appearance of urine.

I do not think that a man that makes an examination of urine, in good faith, if he were not a skillful man, might be deceived by such a concoction as that. It is possible that a man could be mistaken honestly in it. I will agree with the statement that all physicians are not equally skilled in the treatment of diseases. It is possible, not only possible, but altogether probable, that a man might be honestly mistaken, if he makes an investigation. It is just a possibility that if he lacked the knowledge to make the kind of an investigation necessary, he might be mistaken. Library paste is a secret combination. It does contain dextrine. That is simply heated starch, which sweetens it and makes it sticky. The granules of starch are destroyed, so that they can be recognized no more. That would not produce a sugary condition. It has water and flavoring agent in it, that is about all I know. I made a microscopic examination of it, and chemical, so far as the library paste was concerned, in the making up of this urine. I made a qualitative examination to the extent that I have just indicated. I think I could reproduce the exact library paste if I studied it long enough—not with

(Testimony of L. F. Kebler.)

my present knowledge. The process is secret. I know pretty near what it is. There is no chemical effect in it. There are many things about it that I do not know anything about, because it is a secret process.

Mr. PRESTON.—Q. A man that has spent half a century in curing [187] diseases of the genital organs would ordinarily know how to examine urine, would he not?

A. I should think so. In the process of the examination ordinarily required of urine, whether a man thought it was urine or did not think it was, he would necessarily come into the possession of the information as to whether or not it was urine.

Mr. FAIRALL.—Now, if your Honor please, we desire to make a motion on behalf of the defendant for the purpose of the record. We move that the Court now strike out the testimony upon the ground that they have in no way connected the defendant with the commission of the alleged offense, and that they have not shown nor attempted to show that he sent any of the letters mentioned in the indictment, knew of their being sent, ever heard that they had been sent, or in any way assisted or aided or abetted or encouraged anyone else in sending them, or that he had anything to do with sending them. Upon the further ground that no connection has been made between him and the management of this business, other than the fact that he was an officer of the corporation, that he drew the dividends which came to him as a stockholder of the corporation, and that



(Testimony of L. F. Kebler.)

he had no knowledge whatever of the transaction or manner of the transacting of business; upon the further ground that there has been no attempt to show that he ever saw any of these letters, that he ever handled them, that he ever gave any instructions about sending them that he ever consulted, or that he ever advised or ever knew of their being sent; for that reason, we think the testimony has always failed to connected him with the commission of any offense. I understand it to be the law that a defendant charged as this defendant is charged, not as a part of a conspiracy, but as an individual defendant, in order to connect him with the *perpetuation* of the [188] crime, a state of facts must be shown which proves or at least tends to prove that he not only had the opportunity which counsel has shown or attempted to show with much elaboration here, to commit a crime, but that he actually knew that a crime was being committed; knowledge must be brought home to him of the commission of the crime, or if he did not actually assist in the perpetration of it, it was carried on with his connivance and consent. I think that is a very liberal statement of the law. None of these things in any way, shape, or form have been shown.

The COURT.—The motion will be denied.

Mr. FAIRALL.—I except. We now move upon the same grounds that the case be taken from the jury for the reason that none of these acts have been shown, and there is no evidence which in the slight-



(Testimony of L. F. Kebler.)

est degree tends to support the claim of the prosecution that the defendant was in any way connected with the commission of this offense.

The COURT.—That motion also will be denied.

Mr. FAIRALL.—Exception.

**Testimony of A. M. Robinson, for Defendant.**

A. M. ROBINSON, called as witness on behalf of the defendant, after being duly sworn, testified as follows: My name is A. M. Robinson. I reside in San Francisco, and have for about seven years. I was connected with the Jordan Museum from 1909, until the time it was closed, as a doorkeeper. I knew Paul Oesting, and the defendant, Dr. Freeman. All the time I was there I knew them. My services ended there when the office closed in January.

The relation at that time between Dr. Freeman and Paul Oesting when I first went there, was friendly, up to some time in 1910. I cannot state the date exactly. Sometimes during the year 1910, they became unfriendly. They did not speak in my presence; I don't know [189] what transpired outside, but there they were absolutely silent. There were no business communications between them and no friendly intercourse in my presence. I would not say they were personal enemies exactly. They simply ignored each other. To my knowledge, they did not meet and discuss business matters. I have seen them both there at the same time in the building, but they did not speak. Sometimes one directed the affairs there, and sometimes the other, whichever happened to be there, whenever there was some-

(Testimony of A. M. Robinson.)

thing to attend to. Generally the doctor directed the medical department. I don't know that Dr. Freeman was directing that—I do not think so. I did not have anything to do with the medical department, nor with the doctors. I got no directions from Dr. Freeman in regard to the medical department. I was a subordinate to the doctors, and when one of the doctors wanted something attended to in my line, he would give me orders; if Dr. Freeman came in, and wanted something done, he would tell me, and Dr. Oesting the same—some trifling thing to attend to, to see that the doctor did the work a little differently.

At the latter part, I had charge of the mail sending it out. The first part, I think the doctor did—I am not positive of that. There was a different doctor there at times—whoever happened to be head doctor of the offices. When the mail came in in the morning or at different times of the day, I took it. I opened it and separated the papers from the business letters, and gave the business letters to the doctor and cashier, and the letters from the patients to the doctor—not Dr. Freeman, but the doctor in charge of the office. Dr. Freeman received his personal mail there, some of it. I do not know whether he did all, or not. He had a private drawer in one of the desks that he put his mail in. I did not open that. I opened all the mail addressed to L. J. [190] Jordan or Paul Allen, and segregated it, but I did not open his personal mail. I do not think he had an office there. He did not occupy any particular

(Testimony of A. M. Robinson.)

room, nor was he there every day. Sometimes he would be there every day for two or three days, and then maybe he would not be there for a week or two weeks, and maybe a month. The stenographer prepared the mail to go out, I believe, and I had nothing to do with it. I did not put it in the postoffice—I had nothing to do with it. I don't know that Dr. Freeman had anything to do with it. He was not there all the time. Dr. Freeman did not see or treat patients, to my knowledge. During all of that time he was just calling in and visiting the place from time to time. I do not know what he did inside, in the way of directing the business. So far as I know there was no direction. I never heard him give instructions to anyone as to what *do* do with the mail of the patients.

The Government inspectors in this matter asked me a few questions. I do not remember whether they asked about Dr. Freeman's connection with the case, or not. I don't believe they did.

Q. Did they ask you whether he gave instructions or was running the business, or not?

Mr. PRESTON.—To which we object as not proper inquiry, and immaterial.

The COURT.—The objection is sustained.

Mr. FAIRALL.—Exception.

Mr. PRESTON.—Q. Were there any other doctors there? A. Than what?

Q. Than Dr. Freeman.

A. Employed there, you mean?

Q. Yes.

(Testimony of A. M. Robinson.)

A. Always. Usually two. They had separate rooms. I went inside occasionally if I had anything to call me there. Sometimes I took in letters, and things of that [191] kind. I had charge of the museum door. I never knew of Dr. Freeman treating the patients or writing a prescription, or anything of that kind during my time there. I never knew of his directing the manner of treatment or the sending of letters to patients, or anything of that kind. I do not know of patients consulting him or being advised by him or anything of that kind. So far as I know, Dr. Freeman simply came there occasionally and went away again, and would sometimes instruct the janitor about keeping the place in order.

#### Cross-examination.

I was a doorkeeper for the museum and office, generally. When a party would call there and inquire for Dr. Jordan, I would tell him to sit down in the waiting-room—come in and have a seat. If he said, “I want to see Dr. Jordan,” I would say, “Come right in and take a chair.” Then I would report to the doctors that there was a patient that wanted to see them. I reported usually to the senior doctor; if he happened to be busy, sometime the other one. When patients would come in and say they wanted to see Dr. Jordan, then I would go and tell the oldest doctor about it, the senior one. If he was busy, the other one. That is all I had to do—that was the end of my responsibility. Very few of them asked for Dr. Jordan, but sometimes they did.



(Testimony of A. M. Robinson.)

I can see the outside of the consultation rooms from where my seat was. As to the reception room, the door was closed and I could not see anything. Dr. Freeman had desk room and a drawer in the desk there. That was in one of the consultation offices. When he wanted to sit down and spend some time there, there was an unoccupied room there, and he usually sat in that. There were four offices in a bunch; one consultation room is in one corner, and the other is in the other corner, and the unoccupied [192] room was situated like that (illustrating). In the unoccupied room, there was a small table and two or three chairs. You might say that he had an office there, but I would not call it an office myself. He had no desk, just a little round table. He would take his mail out of the consultation room usually and take it in there, when I observed him. There was no other method of approach to the place from the outside, except the door where I stood. When the doctor would come in, I would always know that he was there. I would see him going out. He did not necessarily have to go through the reception room. He could come through the museum entrance if he cared to. He would not necessarily have to go through where the bookkeeper or cashier were stationed, nor would he necessarily have to go through the other rooms, the consultation room. If he went through the museum, he could go that way and get into his room without going into there. I do not think I mailed over half a dozen letters in five years. If the doctor wanted to write a letter, Dr.



(Testimony of A. M. Robinson.)

Freeman, I suppose the stenographer would write it for him, but I don't know. I cannot remember that I ever saw him sit at the desk where the stenographer was. I do not know that mail went out that was written by Dr. Freeman. Sometimes mail came in there addressed to Dr. Freeman. I always knew when they were having the annual meeting of the board of directors. I was not in there. I was outside in another room. I would not know what was going on in there, but I would know they were in there. I do not know whether they held special meetings, or not. I was not on confidential terms with Dr. Freeman at all. I do not remember that he took me out to see Mr. White in regard to seeing a patient who had paid the institution \$5,000, and I do not remember that I took messages from Dr. Freeman to Mr. White in regard to a patient there. I do not know that there was a consultation in which Dr. Freeman took [193] part in regard to the case of a man by the name of Murray. I do not know anything about the Murray case, known on the books as J. W. Wilson. I never heard of the case of J. W. Wilson before. I never heard of the case of Frank Murray. We had a Murray patient there, and it might have been him. I had nothing to do with the \$5,000 man, the money end of it, and I do not know anything about it. I do not know the patient to whom you refer. I heard of a patient by the name of Murray that we had, R. W. Murray. I think he lived in the city. He was a patient there for a good many months. I could not state. I do not know

(Testimony of A. M. Robinson.)

that there was any difficulty about his case in which there was a consultation held.

I do not know as a matter of fact that he was in consultation with the other doctors with regard to this man Murray. I know that he refunded \$150 to a patient. That was the case of Charles Mongetti. I did not talk to the doctor about that, but I heard it spoken about by a good many. Dr. Freeman, to my knowledge, had no other offices than this one. He lived at various places, at the Jefferson Hotel a while and then the Bellevue. He has a wife and son, I believe. I was there from 1909 up to the time the place was closed. There was very little difference between the activities of the doctor at this place in the early part of the period, and the later years, about the same. In 1910, Dr. Freeman and Mr. Oesting were enemies—it might have been even 1909, I could not say. I don't know as they are friendly yet. They speak now, though. They began to speak, to my knowledge, last year—something like that. I don't think they were enemies—they simply did not speak, but why, I do not know. I never heard one of them abuse the other and I never heard of any trouble between them at any time.

I said a while ago that I sometimes took orders from Dr. Freeman and sometimes from other people. That is true. Dr. Freeman [194] would sometimes say there is too much draught, and sometimes too much light, or something of that kind. He had partitions removed or put in. The partition ran up half-way and he had it extended to the ceiling, so as

(Testimony of A. M. Robinson.)

to stop the draught. That was the draught into the offices generally—they got it all over. That is about all he had changed around the place. None of the wax figures were taken out and others put in. I never discussed business with him, but very rarely. I discussed with him whether I had many inquiries or few inquiries. It depended upon whether they had few or many; if it had been increasing, I would tell him business was looking fine; if it was falling off, they were not doing so well. He hired me and the bookkeeper paid me. I was always paid in cash. He told me what he wanted me for, as a doorkeeper. He did not tell me what to do with the patients that came in and asked for Dr. Jordan. I turned them over to the doctors in charge and said, "Here, take this man," and so on. I took my instructions from the doctors. He told me what to say about Dr. Jordan. Practically, he said, "This institution is a corporation, incorporated by Dr. Jordan, and we are all supposed to represent the firm. We are Dr. Jordan, if necessary. If a patient comes in and asks for Jordan, give him a seat." He did not tell me to get the money—that was the point. Dr. Freeman was not present when this doctor was leading me into the light of the situation. I think he remained inside while the instructions were being received, but I don't remember just where he was. He was not in sight, but he might have been within hearing. I do not mean to convey the impression here that Dr. Freeman did not know what was going on in that place. I don't know that he knew—I don't know

(Testimony of A. M. Robinson.)

whether he did or not. I suppose he would.

I do not think Oesting was a doctor. I never heard so. I [195] never pointed him out as Dr. Jordan to anyone, nor did I ever pose myself as Dr. Jordan. I did not always carry out the admonition given to me that we were all to be Dr. Jordan. No one claimed to be Dr. Jordan who was not a doctor—who had not a license to practice. I never pointed out Dr. Freeman and Dr. Jordan.

Mr. PRESTON.—Q. I will ask you if you do not remember about two years ago two patients suffering from gonorrhoea, one from San Francisco, one from San Mateo, coming up there on Sunday and being treated by Dr. Freeman himself?

A. No, I don't know whether the patient was suffering from gonorrhoea, or not. I do not know of any patients that were examined or treated by him on Sunday. I do not know of his ever having examined one. When I told the doctor that business was good, he said, "Fine," and when I said it was bad or a little off, he would say, "The sun will shine just as bright." There was nothing else he would say commenting on the business, that I know of.

#### Redirect Examination.

I do not know anything about the annual meetings of the corporation, nor about the monthly meetings. I do not know anything about a witness who testified here that he kept the books of the corporation and fixed the dividend, and wrote up the minutes and passed them to Dr. Freeman as secretary, to sign. I had nothing to do with the inside of the business.



(Testimony of A. M. Robinson.)

So far as I could see, Dr. Freeman had nothing to do with the treatment of patients, or the handling of the mail matter. I would say that Oesting took a more active interest in the business. He was not there all of the time. Sometimes he would be away for a week. When he was there, he took a great interest in it. He did not consult Dr. Freeman, as far as I know, about the management of the business, because they did not speak. I do not know that they wrote letters to each other at that [196] time.

A JUROR.—Who are the directors of this corporation?

Mr. PRESTON.—Dr. Freeman, Mrs. Freeman, Paul Oesting, and Baker had one share, and afterwards Bechtold; as I recall it, the corporation first had three directors and then four.

The COURT.—You say you opened up the mail. Who was Paul Allen?

A. That was a private address. Lots of times patients in small towns writing did not care to have anybody know, the postmaster knew generally, that they were consulting doctors, treating with doctors.

Q. Paul Allen was just a name?

A. Just a name.

Q. G. M. Freeman had 49,900 shares. A. V. Freeman, 100 shares; E. P. Baker, 1 share; B. Bechtold, 49,998; and Paul Oesting, 1 share. The directors, as I understand it, were Paul Oesting, G. M. Freeman, Addie V. Freeman, and Edward P. Baker, four directors.

I do not know who Bechtold was. I never saw or



(Testimony of A. M. Robinson.)

heard him around there, that I know of. We called that spare room the new patients' room—sometimes new patients would come in and they would sit down in there. Dr. Freeman would occupy that while he was there, because usually the other places were occupied. They would not take new patients in there when Dr. Freeman was in there.

**Testimony of G. M. Freeman, in His Own Behalf.**

G. M. FREEMAN, the defendant, called in his own behalf, after being duly sworn, testified as follows:

My full name is Gideon M. Freeman. I am the defendant. The other men indicted at the same time I was are Dr. Rice and Dr. Burns. They subsequently pleaded guilty and were punished. I was born in North Carolina in 1849. I was educated at Lake Forest College, in North Carolina. I was a soldier during the Civil War. I graduated in medicine in 1873, and came to this state in 1875, and have been here about forty years. I first went to Fresno, second to Visalia, and third [197] in Amador County, and was married there. I was married in Amador County, near Ione. I have been in San Francisco, I guess, for thirty years. It has been so long I have forgotten—something like thirty years, thirty or thirty-five years. I have practiced medicine about thirty or forty years. I am a member of the city and county medical society and the State Medical Society now, as far as I know. I was in general practice in the country, a surgeon, mostly,

(Testimony of G. M. Freeman.)

in the mines, while I was in Amador County. I practiced a long while alone.

Q. When did you buy an interest in this Jordan Museum?

A. About fifteen or sixteen years ago. I am not now in active practice. I have not been practicing medicine for about ten years. I began to retire about the time the fire came, and then absolutely a year or two after. I have never practiced since then, I have not had one single case since then that I can remember of. I have not prescribed for patients, examined patients or consulted with them. During that time I did not have any duties in connection with the Jordan Museum except that of secretary. I paid no attention to the business. Everything was brought to me and passed on, and I would sign anything that was brought up, nothing more. About seven years ago, Paul Oesting and myself had a little friction, and just drifted apart, that is all. I do not think there is any enmity between us, not direct—not serious on my part. I did not fight. We never spoke, that was all—just passed along. During that time, Mr. Oesting mostly had the business. I did not have the slightest thing to do with the management. I did not employ the doctors. I could have done that, but I did not employ any. I feel that I could have employed them by reason of the fact that I owned stock in it. I was allowed that privilege, I think, in some way—I don't know—I know there was something said there about that, but I never exercised the privilege.

(Testimony of G. M. Freeman.)

In a general way, I [198] knew about the manner of the business, but not as to the details I never inquired particularly as to the details, beyond saying, "Well, how are things to-day?" and pass along. I went there occasionally sometimes every day or two, and would stay five or ten minutes, see if there was any mail. Sometimes I would go away and stay a month, maybe a week or two weeks, as the case might be. It was not necessary for me to be there. When I speak of mail, I mean my personal mail. I had some of my personal mail brought there. It was not mail in relation to the medical business or treatment of patients. My own personal matters, friendship letters. That was the place where I got my mail. I did not open the mail or have anything to do with the mail of the business. I never directed the kind of letters, or knew anything about the character of letters that were being sent out. I never examined the form letters that have been spoken of here. I know more about them now than I ever knew before. I never had examined them. I have not read them. I have just heard them read. I never directed the sending of any such letters to anyone. I did not know that they were sent out, letters of that character. At any time, I was not cognizant of the fact that these letters such as have been used here and shown here were being sent to people throughout the state by means of the mail. The doctors who were employed there did not consult me about the treatment of patients or what they should do.

(Testimony of G. M. Freeman.)

There were no monthly meetings. It would go by a month or so, and then they would bring this written page to me and I signed it, but never regularly. There were no meetings held at all. The bookkeeper would simply enter in the minutes, or what purported to be the minutes, the fact that a certain dividend was declared, and I would sign it a month later, maybe two months, maybe three months. I would sign two or three together—maybe more or less. I never dreamed that I was committing fraud upon anyone by being connected with that institution. I was in good faith there. It had been [199] established in 1870 or 1875, and I never dreamed there was anything wrong. I did not have any knowledge that anyone was committing anything wrong. I never entered into any plan or scheme or device with anyone for the purpose of defrauding anyone, in the treatment of the sick or the afflicted. I never entered into any scheme for that purpose under the guise of the Jordan Museum of Anatomy or anything of that kind. I did not go into that business for the purpose of deceiving the public or defrauding it. The Jordan Museum of Anatomy was a regular museum with wax figures and invited people to visit it. An admission was charged, which was collected at the door. They published a book at that time. During all of these years, it seemed to me one of the places of interest in San Francisco. This is the book that Dr. Jordan prepared. As far as I know, it was prepared in the museum when the museum came. It was just re-



(Testimony of G. M. Freeman.)

published—I guess it is the same thing. I had it reprinted. That is the same little book. No one previous to this time ever took any offense at that or said that they were being defrauded by reason of it. That was sold at the book stores as well, and, if I remember right, that was passed upon afterwards by the postal authorities.

The book published and circulated by the Jordan Museum people at that time described in a medical way the effects of self-abuse and syphilis and other diseases, and besides, we had these figures of wax in the museum illustrating it. It had a catalog at the end of each piece describing what it was, and people coming there and viewing these wax figures saw the effects of disease upon the human system.

In those times, there were doctors who were connected with the institution who treated the diseases. Dr. Jordan was not one of them in those days, but Dr. Hastings was. Dr. Jordan brought this [200] museum from Australia about seventy-five or eighty years ago, and then Dr. Jordan sold it to the Dr. Hastings Estate, and Dr. Hastings finally died.

Q. Dr. Freeman, you do not mean that Dr. Jordan exhibited it in San Francisco seventy-five or eighty years ago. You are mistaken in the number of years?

A. Well, pretty close. It might have been seventy, but it was away down on Montgomery street.

Q. You know California was not settled in 1848?

A. Hardly settled—it might have been sixty or

(Testimony of G. M. Freeman.)

sixty-five years ago. Then it was afterwards purchased by Dr. Hastings, one of the best surgeons here at that time. Hastings died, and then a gentleman had it in charge; that is the way it was when I got it. Oesting was in first; I bought a one-third interest in it, and paid \$10,000. The place was at that time valued at \$30,000.

In connection with the treatment of the diseases, the exhibition of these figures, there were doctors, and I was one of them at that time who treated patients who called at the office. I guess I was connected with the treatment of diseases about four or five years. I was actively engaged for four or five years, and better work I never did in my profession than while I was there. I made a great effort, and was as conscientious as could be with my patients. I made a conscientious endeavor to treat patients honestly and fairly and give them the best skill that I had. I did just the same as I did when I was in general practice, absolutely. During the time I was there, I do not think any of these form letters were used. I have tried to think it over, but I have never heard of one until I saw that there. I never used them. I did not have anything to do with the making up of them, nor did I advise anyone as to how they should be constructed or what should be said in them, or in the use of them in any way, shape or manner. [201] Those things grew up in that business after I retired. I heard of them in a general way, but I thought they were always to be used when we had an incompetent stenographer.

(Testimony of G. M. Freeman.)

I never knew they were to be used regularly. If anybody had told me that the letters were used that were here yesterday, I would have surely told them that it was not true, for I never knew that such letters were written; I thought that the stenographer did he work himself. I thought the doctor dictated the matter to the stenographer, who wrote the letters. I never in my life treated a patient by mail, and said that I had examined the urine, when I had not, or said that his condition was one thing, when I believed it to be another, or say that he was sick when I knew that he was well. In both a general and special practice, you have no idea of the number of men who need mental treatment as well as physical, and unless you treat the mind, you cannot cure them. I would first diagnose a case to find out what was wrong. As a rule there is always something wrong with them mentally, and you treat them, not as real diseases, but you get the results in curing the patient. That is very important, and at least one-half to two-thirds the people we treat are affected that way. That is especially true of these diseases of impotency, but in all diseases. I have been practicing a good while. In order to assist your patient, you have to frequently encourage him with the belief that certain things would do him good. Imaginary medicine is often as effective as the real medicine in a case that is not serious. I don't remember of blanks that were there sent out for patients to sign, showing their symptoms and so forth. I do not remember whether that was done,

(Testimony of G. M. Freeman.)

or not. During my time, a very small proportion of the cases came by mail. Very few cases were taken that were really mail cases; you understand what I mean—they would write by mail, but they would come to the [202] office and be examined, a large majority. After they wrote, I would ask them, if possible, to come to the office, but I never sent out any blanks for urine, or things of that kind, that I can remember of. I did not do that myself, and I never knew of that being done at that time. After the fire, the practice changed from what it was altogether. At that time, I was not actively engaged. I got lazy, and did not work and could not work. After the fire, I organized the corporation, and it was after that this practice must have grown up in the business. I never at any time claimed that Dr. Jordan was alive. That has been discussed, my method, and I have felt that everybody's was, that if a patient came in, they would tell them that the doctor was there, to sit down. If they said they would like to see Dr. Jordan, and made any intimation of that kind, I would say, "Dr. Jordan has been dead many, many years, but we are better prepared to treat you than Dr. Jordan was." That is the rule that I always followed. I never told them I was Dr. Jordan, and I never posed as Dr. Jordan, and never had my photograph taken as Dr. Jordan, never signed my name as Dr. Jordan during all of my practice, and never represented to anyone that I was Dr. Jordan. I told any one who asked about



(Testimony of G. M. Freeman.)

Dr. Jordan that he had been dead a great many years.

I never at any time in substance or effect, during my connection with that place, stated to any person with intent to defraud them, or with any other intent, irrespective of symptoms communicated to me, that the symptoms indicated diseases without any real knowledge of the condition of the person who was afflicted with the disease which I said I could cure. I never made any such representations, nor was any such representation made with my knowledge or consent or connivance. I never [203] assisted or aided in any way to carry on or conduct any such transaction. I never by means of letters placed in the postoffice induced, or attempted to induce any person communicating with Dr. Jordan to give me a large sum of money for medical treatment. I never led him to believe I would treat him skillfully when in fact, I did not intend to treat him skillfully. In other words, I have always in my practice of medicine in that museum and other places, endeavored to treat everybody in the most skillful manner that I knew how, too much so, for my own good, because I was too much interested in my cases always, because I felt when they were sick they needed all the assistance I could give them. I have done that in all my practice up to ten years ago since I have practiced. That is true wherever I practice. I did not fraudulently or at all convert any money sent to me for medicines; never sent a patient knowingly medicines of little or no value;

(Testimony of G. M. Freeman.)

never sent them medicines that were not, in my judgment, the medicines which should be sent for the treatment of that particular disease; never sent them medicines for their treatment when I knew they were not suffering from anything, in order to get their money; never sent them medicines and got money from the persons named here, or any other person, with the knowledge or belief that they were incapable of benefiting the persons.

Cross-examination.

This book purports to be written by Dr. L. J. Jordan and it is even signed here in places by Dr. L. J. Jordan. This book was not circulated by me or by the concern of which I was a member, for the purpose of creating the impression that Dr. L. J. Jordan had written this book and was sending it out. This is circulated as the 47th edition of the book, and it is signed by [204] Dr. L. J. Jordan. You might consider that it talks about what I have done in my cases, and all that, as though it was circulated and taking place at the present time, and was now a current production of a man actively engaged in the practice of the profession. That book was not constructed with a view to lead to the belief that it was issued by a man then living. I never saw Dr. Jordan. I never saw anybody who did see him. I do not know that there was such a man. I was not here seventy-five years ago. I changed it to sixty or sixty-five years ago. I could not tell you the man, woman or child that is living, or that ever did live, that knows there was a Dr. Jordan.

(Testimony of G. M. Freeman.)

Who told me there was a Dr. Jordan, is a question I could not answer. I do not think I testified here that this was the production of Dr. Jordan. I said the book was handed down from the Jordan Museum. That is all I know about it. I do not think I testified that this was the product of Dr. Jordan. I do not know who wrote it. I do not think anybody ever told me who wrote it. I do not think anybody ever gave me any information as to who the author of that document was. This is more than thirty years old. I think it is ancient. I did not write the book. I think I should know something about spermatorrhoea.

Q. Tell us then.

Mr. FAIRALL.—We object to that, as he has not testified as an expert. It seems to me it is not proper cross-examination.

The COURT.—Objection overruled.

Mr. FAIRALL.—Exception.

A. Spermatorrhoea is a condition, a disease, usually of the prostate gland. It has to do with the seminal fluid to a degree. Spermatorrhoea is a loss of the seminal fluid in the urine, not necessarily in the urine—ejaculation; also wasting it through [205] the bowels.

Q. What do you do for a man when you want to cure him of that trouble, ejaculating too quick?

Mr. FAIRALL.—I object to that as not proper cross-examination.

A. I am not practicing now.

Mr. PRESTON.—Q. I am talking about the

(Testimony of G. M. Freeman.)

method before the fire on this question.

The COURT.—The objection will be overruled.

Mr. FAIRALL.—Exception.

A. Largely by the mind. The patient is usually absent. You would prescribe medicine for him. If you have got a bad prostate gland you treat the gland and relieve that of congestion. You pat him on the back and give him medicine to take, treat him for the mind condition. You will give him strychnine in some form, that is a very good remedy, and tie a towel around with a big knot in the back, and don't let him lie on his back, so he will not lose semen. I do not say there is nothing the matter with him. It is a very serious thing. I was not talking about treating a man when the trouble existed in his mind. There is no established treatment for a man who believes there is something the matter with him when there is not. The physician must use his judgment. In such cases, we usually furnish medicines, harmless as a rule. I do not know anything about red pills.

Q. What kind of medicines do you prescribe in cases when you want to make the patient believe he is being treated when he needs no treatment?

A. Tone up the nervous system, make the blood richer, use a good deal of caution about the bowels, improve the body in a general way, and then they will naturally improve. [206]

We had a microscope in the institution like the picture in this book. Had it there for fifteen years. It was kept in my office when I was practicing there. I



(Testimony of G. M. Freeman.)

am not keeping any office now. Some—the physicians brought their own instruments, but I don't remember where they were. The museum as such had no such instruments as these. Belonging to the institution itself, there was no microscope. I do not know the real date that I went into this institution. I had my office then at 1051 Market Street. I had no other office at that time, because I had all I could do there, as long as I was practicing, after I went into this institution. I kept no other office, except when they moved the museum. I kept no office other than that, in San Francisco, except for a few months after the fire, during the reconstruction period, then we had another office. When I first went into this institution, my partner was Mr. Oesting. There were no other partners. I owned a one-third interest. I bought the other partner out, you see. There was another party in it. There were three in it, and I bought him out. The third man was a man by the name of Du Boice, and he is long since dead. I acquired his interest after the fire. I increased my holdings in this institution after the fire, that is, I absorbed one-half of the third man's interest, and Mr. Oesting absorbed the other half, and we two were the real or sole owners. When we came to incorporate, we used the names of three people as a corporation, who were really used for purposes of organization. The reason we used the name of Dr. L. J. Jordan in incorporating was it was a good name to incorporate, as the Emporium would be a good name to incorporate under, and L. J. Jordan having been

(Testimony of G. M. Freeman.)

known for a long, long while, why should we not incorporate under that name? Before the incorporation of [207] this institution, the mail went out under the name of L. J. Jordan each letter that we wrote. While I was in active practice, I never wrote a letter at that place in my life. I never signed a letter. That was the stenographer. He wrote the letters. I never did the signing. The stenographer sent the mail out, when I was practicing, signing Dr. L. J. Jordan. I do not think I signed any of the checks on the bank at that time. The checks were written out and signed, but I don't think I signed them, to the best of my memory. I saw two checks where I had signed the name of L. J. Jordan. I had the privilege of signing the checks. At the time I went into this institution, I was the only doctor in it. I was an owner. I was really the only man that was connected with the institution as an owner that had a physician's license. The licenses for running this institution from the time I went into it until it was closed were issued in the name of G. M. Freeman. During the years that Mr. Oesting and myself were not on speaking terms, the name was still used in the same way. We never changed it. I retired from this practice almost abruptly. I was simply tired and old, and I retired. I was over fifty or fifty-one years old, ten years ago. I am sixty-six now, and was fifty-six years old then. I was in fairly good health. I am still in a fairly good state of health. I have been a hard worker all my life. I retired at the age of about fifty-six.

(Testimony of G. M. Freeman.)

What I said about being in active practice for about thirty or thirty-five years in California needs ten years deduction. That is what I told the judge, that we would have to subtract that. I took that off when I was telling him how long I practiced. I did not treat any patient after the fire. I have treated patients for sexual weakness, a great many.

Q. That was a great part of your business?

A. And functional. [208] I heard the symptom blank read here of a man eighty years old. I would not say he needed treatment, but he had it in his mind, just the same, and treatment would give him more satisfaction than anything you ever heard of. He has got to die, but you would make him happy while he lived. He has not got long to hope.

Q. Do you think that a man in a chronic state of sexual debility, having lost entirely the power of erection, important—in other words, in a chronic state eighty years old, was susceptible of cure by the Jordan Museum of Anatomy?

A. He may not have been susceptible of cure, and I think he was not, but he was susceptible of being made comfortable and happy.

The COURT.—Let us have that first letter of the eighty year old man.

Mr. PRESTON.—This is it: "Sometime since on your request I mailed you a copy of my book, 'The Philosophy of Marriage,' which I trust you have received and read with care. I presume you are suffering from some ailment you do not understand, and from which you desire relief. I am sure you wish to

(Testimony of G. M. Freeman.)

make a name for yourself; you do not want to be a failure before your time; you wish vigor and stamina in order to overcome the difficulties you meet in the battle of existence. To do this, you must not be handicapped by weak organs. You must be strong in the loins and gird them up, as directed in the Good Book."

Q. Now, is that the way to pat the old man on the back? A. You couldn't do it that way.

Q. What do you think would be the effect on the old man if he read that letter?

A. It is hard to tell what his temperament was.

Q. Suppose he has the ordinary 80 year old temperament? [209]

A. Well, some of them might take it as fine; it is remarkable how these people are.

The COURT.—Take a 20 year old boy to whom the same letter was sent.

Mr. PRESTON.—We have the same letter written to a 20 year old boy.

A. Understand, I do not sanction these letters, I knew nothing about them. I do not think you would call them fraudulent. You might do it. If there was any fraud carried on, I knew nothing about it. I would very rarely ask how the business was getting along. I came there to get my letters, get my dividends, as I would do at any place. I thought the business that was being carried on there was a good, straight business, as I used to carry it on. I was there off and on, not practically every day. Years ago I hired at least part of the men. I do not think



(Testimony of G. M. Freeman.)

I employed Mr. White. Mr. Robinson usually employed the janitor. I think I employed Mr. Robinson. I do not think there were any instructions such as that I turned him over to the doctor and told him, "Here, instruct him how to run this business." It is not a fact I told him, when people inquired "I am the doctor." I told you a few minutes ago I would say if they inquired for the doctor, I would say, "I was the doctor," if they inquired for Dr. Jordan, I would say, "I am the doctor." If they wanted to know, "Are you Dr. Jordan?" or ask any other question, I said "No, the doctor has been dead many years." I said, "I am the doctor." Some people might draw the natural inference, and some might not, that I was Dr. Jordan. You might consider it susceptible of that construction, that I was Dr. Jordan, but I do not know how a man would think about it. I say you might consider it that way. I said, "I am the doctor," and if he asked for Dr. Jordan, I said, "Dr. Jordan has been dead for many years." It was not necessary for me to say, "I am Dr. Freeman, looking after the business [210] here." It is not a fact that the name of Dr. L. J. Jordan was used for the purpose and for the only purpose and the sole purpose of deceiving people who came there and making them believe they had a doctor of fifty years' standing. This letter-head was gotten out because it was a corporation. I do not remember whether there was a letter-head like that when I was there. I have seen this letter-head. I don't think they were used before the fire. I did not use them in

(Testimony of G. M. Freeman.)

writing my own letters. My own private letters I wrote myself at my hotel in longhand.

Q. Here is "Jordan's Museum of Anatomy. Established fifty years. Diseases of Men. Private address Paul Allen, 986 Market Street." You have up here in the left-hand corner "Office of Dr. L. J. Jordan, 986 Market street." A. Yes.

Q. You know that that is a falsehood on its face, don't you?

A. You might call it that. But I have always considered it like the Emporium, a large store down here, and other firms, like lawyers and doctors, operating under a name.

I knew that "Office of Dr. L. J. Jordan, 986 Market Street, opposite Sixth; Hours 9 A. M. to 5 P. M. and 7 to 9 P. M., Sundays 10 to 12 A. M." was on the literature. I have known it a long time.

Q. Then if you knew that this kind of letter-head was going out, why didn't you stop it?

A. Well, I just told you—I don't know how to answer you, so I will say I don't know. I do not think I had the power. I knew that there were people working for this corporation that were busy sending out mail. I knew that.

Q. You knew that this concern was advertising, did you not?

Mr. FAIRALL.—We object to that upon the ground that there is no evidence that they were advertising or sending out mail.

The COURT.—The objection will be overruled.

Mr. FAIRALL.—Exception.

(Testimony of G. M. Freeman.)

A. Yes, I have seen mail delivered there daily. I did not know [211] that samples of urine were coming in from the four quarters of the earth. I knew there were some that came. I did not know that tests for alleged diseases of the genital organs were being furnished by the mail system.

Q. You knew it was going on?

A. Very few. I do not believe that 30% of the business or the money that we were collecting every month came from this source. I think the patients that were received through the mail did not amount to probably more than 6% ; I do not believe that. I did not say I knew it. I do not believe it. I do not know. I base my opinion on the fact that the most of the matter that was done was written to patients who had been to the office and had been treated there; that is where the most of the mail came from; very few, comparatively very few new patients were taken by mail. I don't know but I think Mr. Burns, the stenographer, will bear me out, that people that you wrote to would come in, and there might be 30%, but I don't think the patients taken through the mail entirely would amount to more than 6%. I honestly believe that. I do not know anything about blood examinations and never did. I never made any microscopical examinations of urine in that place. I could not say that the institution was not equipped for the purpose of making a microscopical examination of urine, because some of the doctors had a microscope for doing their work there. Some of those doctors got more than \$100 a month, and they

(Testimony of G. M. Freeman.)

had a commission, too. They were getting a commission of maybe 10%. I never knew a man's salary in that place. I never knew what Mr. Burns got and I never knew what Mr. Robinson got. I did not know what deductions were made or were being made from the gross receipts. I did not know what was being paid for help or for the doctors. I did not go there for my mail every morning. I came up there maybe in a week or maybe two or three days, I would be passing by. Part of the [212] time Oesting signed checks for my part of the money, and part of the time I did. The checks were already made out for me, so I had nothing to do with them at all. When a deficit was reported, I did not know whether it was correct or incorrect.

I had no other business whatever. I spent my time at a little chicken ranch down here—I go down there sometimes. It is a perfect pleasure. I go down there and spend a little time. I never treated a patient by the name of Baker who came up from San Mateo on Sunday to see me. I do not remember any such case. I do not remember this man Murray that has been spoken of. I did not hear this Italian man mentioned. About giving him a check for \$150, they say I did, but I do not remember that. If I did, it would be something out of the ordinary, and I would remember it, but I don't remember it.

Q. What part of this business here, this Jordan institution, interested you—what part of it appealed to you?

A. What appeals to a man when he quits business



(Testimony of G. M. Freeman.)

and has retired and is doing nothing—that is the part of it appealed to me.

Q. The income you mean?

A. I was dependent upon the income.

Q. The evidence here shows that as early as 1909, the same stock letters were being sent out to me indiscriminately all over the country. Do you think that could take place right under your nose, and you not know anything about it?

A. I think so, because as far as the medical part was concerned, I never paid any attention to it.

Q. There are annual stockholders' meetings and directors' meetings here, where reports of the business of the institution are supposed to have been had. Did you have any such report?

A. At the annual meeting—once a year we had the stockholders' meeting. I had reports, I think, in a very indefinite way. The books were locked up all the time. I think the books were present [213] when we had annual meetings. I don't know what books they had because I never paid any attention. I do not know what became of the books of the corporation. I think there was a day-book. I have seen it. I think I have looked in it. I do not remember what kind of data there was in it. There was a card system with a cabinet to file the cards in. The kind of data on it was everything pertaining to a patient, his disease and so on. They were kept in a little case. I had access to the room where that was. I sometimes passed through there. I do not remember a card system about prospective patients,

(Testimony of G. M. Freeman.)

patients who had not yet begun to take treatment. The card you show me here, I imagine was kept by the stenographer. I don't think anybody saw that but him. It was kept in a little box about that long and about that wide. I know there was a little card kept by the typewriter, but I don't think anybody ever looked at it. I do not know that that was a card system used to store information in regard to prospective patients who had not yet taken treatment. It was for the personal use of the stenographer. Burns was employed there to write letters, all kinds of letters. If I would ask him to write a letter, he would do it for me. After the indictment was found in this case, I never sent out one of the same letters from the institution. I did not know they were being sent out. I never knew that letters of that character were in my life. I first learned that there were letters of this character in this institution when they were read to me right here. I never dreamed of them before. I thought the stenographer wrote his own letters; I have copies of this same file. I turned over to you this file of papers, but I never read it. Indicted, about to come to trial, with these papers in my possession, I never read them, nor ever commented upon them. No one commented on them in my presence. I did not know that these letters had been sent out. I found out [214] that the institution possessed such letters when you were reading them.

Q. Don't you know as a matter of fact, Doctor, that you ordered Mr. Burns here to send to your son

(Testimony of G. M. Freeman.)

in Los Angeles a copy or a duplicate of each of those letters?

A. I did, and I wanted to explain that yesterday. I talked with Mr. Burns, and I saw he was a bright letter writer, and I wanted him to write a letter out of his own mind and send it down there, so that my son might see it, because I thought he was brilliant, and I thought they were his own emanation, and I never went over these letters to find that out. I had in mind that he was a bright fellow. I had never read a letter of his. He had written so much, and I thought he was—you know, I never believed that Burns was guilty. I could not believe that he was. I did not pay his fine here. It was not paid out of funds of the institution. They had him scared. He was persecuted, as I say, I had an attorney, and he led me to the brink of pleading guilty; I realized it, and we went to a place here at night, and I told that attorney and his wife, "I will die of rot before I do it, but I am not guilty, and I will not lie to be cleared." "Why", he says, "It is the easiest way out of it. They will persecute you the balance of your life." He says, "They will break you. You won't have a dollar left in the world unless you plead guilty," and I refused. I ran one morning—I did not know Judge Fairall at that time, but I had heard of him—I went to one lawyer and another, and they would say, the whole business, to plead guilty. I said, "Burns did not do it." I told Burns, "I will take you to my lawyer." This is after I found Judge Fairall, and he told me not to plead guilty, I

(Testimony of G. M. Freeman.)

would be guilty—I never was in a law court before in my life, I have led an honorable, upright life, and I believe from my heart that I have been persecuted; by whom, I don't know. So my lawyer left me, or I left him, and I told him— [215] I did not pay his fine. It was not paid out of the business. I was never acquainted with Williams until Choynski turned me over to him. They never got a dollar of it from me. I do not think the firm paid the attorneys for Burns and Rice. It was for ourselves, Paul and I. Paul has never been indicted.

Q. Don't you know that Burns and Rice were included in this very proposition?

A. Possibly they were. Will you let me explain?

Mr. FAIRALL.—Go on and explain.

A. We never employed Williams; we employed Colonel Choynski; he was an old friend of ours. I was never acquainted with Mr. Williams, and the first I knew he sent us a bill of \$500, and the firm paid that, and then Choynski was going away, and finally I said to Mr. Williams, "I don't know what I am going to do. I do not believe that you are helping me any." And "Why," he says, "Don't you want to protect another?" I said, "My wife is just as dear to me as anybody else in the world and I have got to protect myself." Then I went to Mr. Burns and I said to Mr. Burns, "Don't plead guilty, I will take you to my lawyer."

These signatures here are mine. This signature card has my signature on it. I signed the check of the institution by agreement between Mr. Oesting



(Testimony of G. M. Freeman.)

and myself. I do not know how long that agreement has been in existence, since we have been in business together, during all the time we were in business together. This agreement was that we should both draw on the bank. I never exercised that privileged except in a rare instance. I could draw and Paul could draw. We each enjoyed equal power in that respect. Mr. Oesting was a little more active in the business than I was. He attended to the business more closely than I did. He was not a physician. He is a druggist.

Q. Did I understand you to mean that in this institution being carried on by you there, you were treating people who had no trouble as well as people who did?

A. I never did. I never [216] intentionally said or meant that I treated people who believed they had trouble when they did not have. I said such cases might be true and they might be benefitted. I have treated some years ago. I have treated one since the Jordan Museum was established.

#### Redirect Examination.

Mr. FAIRALL.—Q. The district attorney asked you yesterday if you ever knew of anyone who said that he knew Dr. Jordan. Now, do you know of anyone who ever said to you that you knew Dr. Jordan?

A. Yes. Judge Seawell. In the trial of the case up there involving the same case, he said when he dismissed the case, "I knew Dr. Jordan." He said that he knew Dr. Jordan.

Mr. PRESTON.—Q. Did he claim to know Dr.

(Testimony of G. M. Freeman.)

Jordan or someone else?

A. That is all he said.

### **Charge to the Jury.**

The COURT.—Defendant has been indicted for using the mails in furtherance of a scheme to defraud. The substance of the statute under which he is charged is as follows:

“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,—shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter,—in any postoffice,—of the United States, to be sent or delivered by the postoffice establishment of the United States, or shall take or receive any such therefrom,—shall be” punished as therein provided. To constitute an offense under the section you will observe that two elements are essential:

1. The devising by the defendant of a scheme or artifice to defraud; and [217]

2. The use of the United States mails, as set out in the section, for the purpose of executing or attempting to execute such scheme or artifice.

The indictment is in five counts, each count setting forth the same alleged scheme to defraud and averring that in furtherance thereof the defendant placed and caused to be placed in the postoffice establishment at San Francisco to be sent or delivered a certain letter which is therein set out.

The letter set out in the first count is averred to have been addressed by defendant to Mr. John Bam-

mer, Colusa, California; the second to J. P. Mills-paugh, at Cherry Creek, Nevada; the third to George R. Alberts, at Tombstone, Arizona; the fourth to Anson Ashford at Buckley, Washington; and the fifth to John Caroway at Oroville, California. All of these letters have been read to you, and may be found in the indictment, but because of their length have not been here repeated. Certain other letters not set out in the indictment have been admitted in evidence. The jury will only consider these letters for the purpose of showing, if they do show, the intent with which the acts set forth in the indictment were committed, if you find that they were committed as charged. The jury will not consider these other letters for the purpose of determining whether or not the acts set out in the indictment were actually committed, but only for the purpose of determining the intent with which they were committed, if you find from the other evidence that they were in fact committed. If you find that a scheme to defraud as set out in the indictment was devised, and that for the purpose of executing such scheme or attempting to do so there was placed or caused to be placed in the United States mails as averred, to be sent or delivered by the postoffice establishment, the letters or any one or *more them* set out in the indictment it is not material that such letter or letters was addressed to fictitious person, and sent in response to test letters [218] to decoy letters sent them by the Postoffice Inspectors. It is the business of the executive officers of the government to see that this law

is enforced. And when the Postoffice Department, through its representatives, in the discharge of their duty learn or suspect that any scheme *or defraud* is being operated through the United States mails, it is their duty to see that the fraud is uncovered and the officers of the United States Government, if their purpose was to uncover a scheme to defraud in the prosecution of the case, and the officers of the United States Department of Justice in aiding them, are simply performing a duty that is placed upon them by the laws of the country.

Now, the scheme as set forth in the indictment, and stripped of the accompanying legal verbiage is substantially that the defendant should by means of certain advertisements, letters, circulars and pamphlets induce certain persons named in the indictment and others to the grand jurors unknown to communicate with one Dr. Jordan, who was not a real or existing person, relative to real or supposed ailments, and that defendant should then, by means of letters and through the postoffice department, and irrespective of any symptoms communicated, and even in cases where the symptoms indicated health rather than disease, and without any real knowledge of the condition of the person so induced to communicate, state to such person that he was afflicted with a disease which he, Dr. Jordan, could cure, and that he would furnish treatment for such disease for a certain sum of money, and by means of such letters would induce such persons to send money for the purpose of procuring medicine and treatments skill-



fully and properly designed and prepared for the cure of the disease with which such person was afflicted, or had been induced to believe himself afflicted, which money he would fraudulently convert to his own use, and in return therefor should send to such person certain medicines of little or no value, and not medicine and treatment skillfully and properly [219] designed and prepared for the cure of such person, the defendant having no real or proper knowledge of such person's condition, or whether he was diseased or not, or whether or not such purported medicine was capable of benefiting such person, as he well knew.

It is not essential to warrant a conviction that the alleged scheme to defraud should be proved exactly and in all the details as alleged, but it is sufficient if it be proved beyond a reasonable doubt, substantially as alleged, and in determining this fact you have a right to view and consider all the evidence in the case in the light of your own experience and common sense. You will consider the correspondence admitted in evidence, the various symptom blanks and their accompanying letters, the testimony of the doctors in relation thereto, whether or not, under the evidence, such blanks and letters showed no condition of disease, and whether or not those connected with the Jordan corporation knew that to be the fact, and whether or not the accompanying correspondence was intended to lead the persons sending letters and symptom blanks to believe that they were suffering from disease which the said Dr. Jordan

could cure, when such was not the fact, and whether or not those at the institution knew from the letters and symptom blanks that such was not the fact; and from all of these matters, as you may find them to exist, and such other circumstances as are in evidence, you will determine whether or not there was in existence a scheme to defraud, substantially as set out in the indictment. Nor is *it all* essential to the commission of the offense charged that any person should actually have been defrauded. It is sufficient for a completed offense that a scheme substantially as alleged in the indictment was devised; that the same was, and was intended to be a scheme to defraud, and that in furtherance thereof the letters or some of them were sent through the United States mails to be delivered; whether such scheme was successfully carried [220] out or not. You will therefore determine whether there was devised a scheme to defraud, substantially as set out in the indictment, and whether the mails were used as alleged in furtherance thereof. If you find both of these elements of the offense to exist, then you will determine what, if anything, the defendant had to do with it. And in determining this you will bear in mind that it is not necessary to warrant a conviction that the defendant himself should have personally done the things charged. But it is sufficient to warrant such conviction, if you find that the offense was actually committed by others, that the defendant, either aided, abetted, counseled, commanded, induced or procured such commission. Nor should the jury be at all influenced, in passing upon the facts of this

case, by any belief that some other person or persons should have been indicted for the same offense. If the defendant has been shown to be guilty beyond a reasonable doubt, your verdict should so declare, notwithstanding the omission from the indictment of any other persons whom you may believe to have been guilty.

In order to render an officer of a corporation personally liable in a criminal action for the acts of the corporation, such officer must have participated in some way as heretofore explained, in such criminal act. The mere performance of the duties of secretary of a corporation or the acceptance of dividends, or both combined, cannot render an officer of a corporation criminally liable for an act committed by another of which he had no information or knowledge before its commission.

A principal is never liable criminally for the act of his agent unless committed by the direct command of the principal or with his consent. But consent which will render the principal liable for the act of his agent must be consent based on a knowledge of the act about to be committed by the agent. It must be shown here in order to warrant a conviction that defendant had knowledge [221] of the fraud, if you find that fraud was committed, and that having such knowledge, he either actually participated in the offense, or as stated, aided, abetted, counseled, commanded, induced or procured such commission. The mere opportunity to have knowledge without further circumstances, is not equivalent to actual knowledge, but in passing upon this phase of the

case, you must consider all the circumstances as shown here, including the opportunity for knowledge. You are not, however, permitted to infer guilty knowledge of an officer of a corporation or impute such knowledge to him from the fact alone that certain employees did in fact violate the law, and you cannot infer that the defendant knew of any infraction of the criminal law in this case from the fact alone that certain of the employees of the Jordan Museum did in fact commit the acts charged in the indictment in this case. But in this connection you will consider all the evidence introduced at the trial; the defendant's long connection with the establishment, his frequent presence at the place of business, the activity of the defendant whatever it was, in and about the said place of business; the possibility or impossibility of one long connected with the institution being ignorant of what was actually going on in the establishment, or of its methods of doing business, and in all the matters submitted to you you will view the case, in the light of your own experience and common sense.

You are the exclusive judges of the credibility of the witnesses and the weight to be given to their testimony, and you are not bound to decide in conformity with the declarations of any number of witnesses whose testimony does not produce conviction in your minds as against a less number, or presumption of law, or other evidence satisfying to your minds. The party accused is entitled to the presumption of innocence and it is a rule which you are bound to follow in this case that the guilt of the de-



fendant must be [222] proven beyond all reasonable doubt before you can convict him of the crime charged in the indictment.

Where circumstances alone are relied upon for conviction, the rule of law is, that to warrant conviction, such a state of facts and circumstances must be shown that they are all consistent with the guilt of the defendant and such as cannot upon any reasonable theory and hypothesis be true and the defendant be innocent and in this case the rule should be applied by the jury to that portion of the evidence offered by the Government wholly of a circumstantial nature. It is not necessary for the defendant to prove his innocence but the burden rests upon the prosecution to establish every element of the crime with which he is charged, and every element of the crime must be established to a moral certainty and beyond all reasonable doubt. Mere probabilities or suspicions or surmises are not sufficient to warrant a conviction, nor is it sufficient that the greater weight or preponderance of the evidence supports the allegations of the indictment, nor is it sufficient that upon the doctrine of chances it is more probable that the defendant is guilty than innocent.

While before you can find the defendant guilty of the charge in the indictment, the evidence must satisfy you as to his guilt beyond a reasonable doubt, yet you will understand from this that the Government is called upon to make a case free from any possible doubt, that is, to prove the defendant's guilt, to an unassailable demonstration. Such is not the law, for such proof is rarely obtainable in dealing

with human transactions; in other words, the doubt which will justify your hesitation must be based in reason and arise upon the evidence, and not consist of mere fanciful hesitation growing out of your sympathies or based upon something other than a fair and impartial consideration of the evidence in the case. The term reasonable doubt means just what its language imports. [223] To be a reasonable doubt it must be based upon reason. There is hardly anything relating to human affairs that is not open to some possible or fanciful or imaginary doubt. More possible or fanciful or imaginary doubts are not reasonable doubts. A reasonable doubt is that state of the case which, after the entire comparison and examination of all the facts and circumstances leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge, and no juror should vote for conviction so long as he entertains such reasonable doubt.

It takes the concurrence of all of you to agree on a verdict, and if you so agree you will have the verdict signed by your foreman and returned into court.

The above and foregoing contains all of the evidence of any and every character given, and all of the proceedings had upon the entire trial of this cause; and all of the instructions of the Court to the jury; and all of the proceedings had and all of the evidence given upon defendant's motion for a new trial thereof; and all of the proceedings relating to the judgment and sentence pronounced and imposed upon the defendant herein.

And, now, within the time allowed by law and the rules and orders of this Court, duly and regularly made in this behalf, the defendant Gideon M. Freeman hereby proposes the above and foregoing as and for his Bill of Exceptions upon Writ of Error herein, and prays that the same be settled, allowed, signed and authenticated by this Court as in proper form and as conforming to the truth and as the true Bill of Exceptions herein, and that it be made a part of the record in this cause.

Dated at San Francisco, California, this 25th day of August, 1915.

CHARLES H. FAIRALL,  
Attorney for Defendant.

KNIGHT & HEGGERTY,  
Of Counsel. [224]

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*In the District Court of the United States, for the  
Northern District of California, First Division.*

No. 5686.

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

GIDEON M. FREEMAN,  
Defendant.

**Notice of Presentation to Plaintiff of Defendant's  
Proposed Bill of Exception.**

To the UNITED STATES OF AMERICA, Plaintiff, and To Its Attorney, JOHN W. PRESTON, Esq., and its Assistant Attorney, WALTER B. HETTMAN:

YOU WILL PLEASE TAKE NOTICE that the above and foregoing constitutes and is the Proposed Bill of Exceptions of the Defendant GIDEON M. FREEMAN, upon his Writ of Error in the above-entitled cause, and that said defendant will apply to the above-entitled Court to settle, allow, sign and authenticate the same as in proper form and as conforming to the truth and as to the true Bill of Exceptions herein, and to make it a part of the record in this cause.

Dated at San Francisco, California, this 25th day of August, 1915.

CHARLES H. FAIRALL,  
Attorney for Defendant.

KNIGHT & HEGGERTY,  
Of Counsel.

Due and legal service of the above and foregoing Proposed Bill of Exceptions by Copy is hereby admitted this 25th day of August, 1915.

JNO. W. PRESTON,  
Attorney for Plaintiff. [225]



*In the District Court of the United States, for the  
Northern District of California, First Division.*

No. 5686.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

GIDEON M. FREEMAN,

Defendant.

**Stipulation as to Bill of Exceptions.**

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the above and foregoing Proposed Bill of Exceptions upon Writ of Error herein has been presented within the time allowed by law and the rules and orders of this Court duly and regularly made in this behalf, and that the same is in proper form and conforms to the truth, and that it may be settled, allowed, signed and authenticated by this Court as the true Bill of Exceptions herein, and that it may be made part of the record in this cause.

Dated at San Francisco, California, this 15th day of October, 1915.

JNO. W. PRESTON,

Attorney for the Plaintiff.

CHARLES H. FAIRALL,

Attorney for the Defendant.

*In the District Court of the United States, for the  
Northern District of California, First Division.*

No. 5686.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

GIDEON M. FREEMAN,

Defendant.

**Order Settling, Allowing, Signing and Authenticat-  
ing Proposed Bill of Exceptions and Making  
the Same Part of the Record.**

The above and foregoing Bill of Exceptions duly proposed [226] by the defendant, and duly agreed upon by the respective parties hereto, having been presented to the Court within the time allowed and required by law and the rules and orders of this Court duly and regularly made in that behalf, is hereby settled, allowed, signed and authenticated as in proper form and as to conforming to the truth and as the true Bill of Exceptions herein, and is hereby made a part of the record in this cause.

Dated at San Francisco, California, this 15 day of October, 1915.

M. T. DOOLING,

Judge of the District Court of the United States, for  
the Northern District of California.

Due service of the within Bill of Exceptions is hereby admitted this 15th day of October, 1915.

JNO. W. PRESTON,

Attorney for the Plff.

[Endorsed]: Lodged Aug. 25, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. Filed Oct. 15, 1915. W. B. Maling, Clerk. By Lyle S Morris, Deputy Clerk. [227]

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*In the District Court of the United States, for the  
Northern District of California, First Division.*

No. 5686.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

DR. GIDEON M. FREEMAN,

Defendant.

**Petition for Writ of Error.**

Now comes Dr. Gideon M. Freeman, the defendant herein, and brings this his Petition for a Writ of Error to the District Court of the United States, for the Northern District of California, and respectfully shows:

That on the 15th day of May, 1915, there was rendered and entered in the above-entitled court a Judgment and Sentence against him, the above-named defendant, whereby the defendant was adjudged and sentenced to be imprisoned for the term of one year in the county jail of the County of Alameda, State of California, and to pay a fine of one thousand dollars; in which judgment and sentence against said defendant, and in the proceedings had thereunto in this cause, certain errors were committed to the prejudice of said above-named defendant, all of

which will more in detail appear from the Assignment of Errors which is filed with this Petition.

WHEREFORE said above-named defendant prays that a Writ of Error may be issued in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction [228] of the errors so complained of, and that a Transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals, and that all further proceedings in the above-entitled District Court be suspended, stayed and superseded, and that sentence and execution herein be stayed until the final disposition of said Writ of Error in said United States Circuit Court of Appeals, for the Ninth Circuit.

Dated October 21st, 1915.

KNIGHT & HEGGERTY,

Attorneys for Petitioner.

Due service and receipt of a copy of the within Petition for Writ of Error is hereby admitted this 22d day of October, 1915.

JNO. W. PRESTON,

United States Attorney, Attorney for Plaintiff.

[Endorsed]: Filed Oct. 22, 1915. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [229]



*In the District Court of the United States, for the  
Northern District of California, First Division.*

No. 5686.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

DR. GIDEON M. FREEMAN,

Defendant.

**Assignment of Errors.**

Now comes the defendant Gideon M. Freeman, in the above-entitled cause, and, in connection with his Petition for a Writ of Error herein, makes the following Assignment of Errors which he avers occurred upon the trial of said cause, to wit:

1. That the Court erred in overruling the Demurrer of the defendant herein to the Indictment herein.

2. That the Court erred in rendering and giving Judgment against the defendant herein for the reason that the Indictment found against the defendant and upon which he was tried, found guilty and said judgment and sentence of the Court rendered and imposed against him, does not state or set forth sufficient facts to constitute an offense under the Laws of the United States.

3. That the Court erred in sentencing said defendant for the same reason last stated.

4. That the Court erred in rendering Judgment and imposing sentence upon said defendant, for the reason that said judgment and sentence and the ver-

dict of the jury herein upon which said judgment and sentence were based were not supported [230] by the evidence introduced herein.

5. The Court erred in overruling the objection of the defendant to the witness G. A. Leonard reading to the jury the Government's Exhibit "A," until it had been shown that the defendant was in some way connected with the writing of it; and also in denying the motion to strike out said exhibit as irrelevant, incompetent and hearsay and had in no way been connected with the defendant or the Jordan Museum or with Dr. Jordan or any party connected with the case; and also in overruling similar objections and denying similar motions to strike out each one of the letters offered and admitted in evidence, being papers known as Government's Exhibit "A," during the examination and testimony of said witness G. A. Leonard, and each one of the letters and papers in the file of correspondence known and marked as Government's Exhibit "B," admitted in evidence during the testimony of the same witness; and in admitting in evidence the letter United States Exhibit 2 and the package marked United States Exhibit No. 3; the said letters, papers and correspondence, being the correspondence stated by said witness to be the "Test Correspondence."

6. The Court erred in overruling the same objection as last stated to the contents of the file exhibit "C" for identification, and in denying the motion to strike out the same.

7. The Court erred in overruling the objection of the defendant to the testimony of the witness H. C. Walker as to the correspondence he had with the Jordan Museum introduced for the purpose of showing a similar offense, upon the ground that similar offenses could not be shown until some offense had been shown against the defendant, and is irrelevant and incompetent, and allowing said correspondence to be introduced in evidence; and in overruling the objections as immaterial, as to how said witness came [231] to give the letters in said package to the Postal Inspectors, and in allowing the testimony of the said witness as to what he did, and what was done to and with the witness, and what was said and done by him and others; and in denying the motion of defendant to strike out all of the testimony of the witness as to said matters on the ground that it did not show a certainty in this—that the evidence shows that this man took the treatment in person, and after a personal examination and there is no similarity between the cases at all; and allowing in evidence the letters testified to as said witness H. C. Walker; and also in denying the motion of the defendant to strike out all of the testimony of the said witness and also the said letters; the said documents and letters being marked United States Exhibit No. 8.

8. The Court erred in overruling the objection of defendant to the testimony of the witness Edward Boerner as to what was done by defendant prior to 1910; and the Court erred in denying each of the motions to strike out portions of said testi-

mony and in overruling the objections of defendant to the evidence of the said witness, and in overruling each of the objections of defendant to the testimony of the said witness.

9. The Court erred in overruling the objection of the defendant to the contents of Government's Exhibit 11.

10. The Court erred in overruling the objections to the Minutes of the Corporation during the evidence of the witness Burn and to the contents of the said Minutes and especially to anything that occurred after the last letter set out in the Indictment, namely; August 13, 1913.

11. The Court erred in denying the motion of defendant to strike out all of the testimony upon the ground that it in no way connected the defendant with the commission of the [232] alleged offense and that it did not show that the defendant sent any of the letters mentioned in the Indictment or knew of them being sent, or ever heard that they had been sent, made by the counsel for the defendant at the conclusion of the testimony of the witness L. F. Kebler, who was called as a witness on behalf of the Government.

12. The Court erred in denying the motion of the defendants made at the conclusion of the case of the United States, upon the same grounds as stated in the motion to strike out last mentioned, that the case be taken from the jury for the reason that none of the acts charged in the Indictment had been shown and that there was no evidence which in the slightest degree tended to support the claim of the



prosecution that the defendant was in any way connected with the commission of the offense.

13. The evidence introduced in this case on behalf of the Government was and is absolutely insufficient to sustain or justify the verdict of the jury finding defendant guilty, or to sustain or justify the judgment of the Court and sentence imposed upon the defendant; and the Court erred in rendering and giving the said judgment and sentence of fine and imprisonment against the defendant.

14. There is no evidence in this case that this defendant was in the active or actual conduct of the business of said corporation, or did any of the acts and things shown by the evidence, or that he acted or participated in the said business or the conduct thereof, or had anything whatever to do therewith or any control or direction thereof, in any way or manner, and was solely and only a stockholder in the said corporation and received dividends upon his stock therein as such stockholder; and the Court erred in imposing and giving said judgment and sentence against [233] defendant.

15. There is no evidence that defendant ever entered into, or had devised or did devise or intend to devise any scheme or artifice to defraud, etc., as charged in the Indictment; or devised the said scheme or artifice, or that the same was a scheme or artifice under said section 215 of the Criminal Code, or used the United States Mails for the purpose of executing or attempting to execute the said or such scheme or artifice.

WHEREAS, by the law of the land, said Judgment ought to be given for said Dr. Gideon M. Freeman, plaintiff in error, and against the United States of America, defendant in error, said plaintiff in error, does now pray the Judgment herein rendered against him to be reversed and annulled and altogether held for nothing, and the sentence herein imposed upon him to be set aside and held for naught, and that he be restored to all things which he has lost by occasion of the said Judgment, and that he be afforded such and any and all other relief as may be meet in the premises herein.

Dated at San Francisco, California, October 21st, 1915.

KNIGHT & HEGGERTY,  
Attorneys for Said Defendant, Dr. Gideon M. Freeman.

Due service and receipt of a copy of the within Assignment of Errors is hereby admitted this 22 day of October, 1915.

JNO. W. PRESTON,  
United States Attorney.

[Endorsed]: Filed Oct. 22, 1915. W. B. Maling,  
Clerk. By T. L. Baldwin, Deputy Clerk. [234]

*In the District Court of the United States, for the  
Northern District of California, First Division.*

No. 5686.

DR. GIDEON M. FREEMAN,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

**Order Allowing Writ of Error and Supersedeas.**

In the above-entitled cause the Petition of the defendant in said cause for a Writ of Error is hereby granted and allowed, and IT IS ORDERED that a Writ of Error be, and the same hereby is, allowed to have removed in the United States Circuit Court of Appeals, the Judgment heretofore entered herein, and that the said Writ of Error shall operate as a Supersedeas; and that the said defendant, Dr. Gideon M. Freeman be and he hereby is admitted to bail upon the said Writ of Error in the sum of \$1000.

It is further ordered that the Bond for costs upon the said Writ of Error be and hereby is fixed at the sum of \$500.

M. T. DOOLING,

United States District Judge.

Due service of the foregoing Order, by copy, is hereby admitted this 22d day of October, 1915.

JNO. W. PRESTON,

United States Attorney.

[Endorsed]: Filed Oct. 22, 1915. W. B. Maling,  
Clerk. By T. L. Baldwin, Deputy Clerk. [235]

**Bond on Writ of Error for Costs.**

KNOW ALL MEN BY THESE PRESENTS, That we, Gideon M. Freeman, as principal, and United States Fidelity and Guaranty Co., as sureties, are held and firmly bound unto The United States of America in the full and just sum of Five hundred (500) dollars, to be paid to the said United States of America, certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 11th day of November, in the year of our Lord one thousand nine hundred and fifteen.

WHEREAS, lately at a District Court of the United States for the Northern District of California, First Division, in a suit depending in said court, between the United States of America and Gideon M. Freeman a Judgment of guilty was rendered against the said Gideon M. Freeman and the said Gideon M. Freeman having obtained from said Court a writ of error to reverse the Judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, the condition of the above obligation is such, That if the said Gideon M. Freeman shall



prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

G. M. FREEMAN. [Seal]

UNITED STATES FIDELITY & GUAR-  
ANTY CO., [Seal]

A Corporation Organized Under the Laws of the  
State of Maryland.

By BRADLEY CARR,  
Attorney-in-fact.

Acknowledged before me the day and year first  
above written.

[Seal] FRANCIS KRULL,  
United States Commissioner, North. Dist. of Cali-  
fornia.

[Endorsed]: Filed Nov. 11, 1915. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [236]

**Bond to Appear Pending Determination of Writ of  
Error.**

United States of America,  
Northern District of California,—ss.

BE IT REMEMBERED, That on this 11th day of  
November, in the year of our Lord one thousand  
nine hundred and fifteen before the undersigned,  
a United States Commissioner, duly appointed by the  
District Court of the United States for the Nor-  
thern District of California, First Division, to take  
acknowledgments of bail and affidavits, and also to  
take depositions of witnesses in civil causes depend-  
ing in the courts of the United States, pursuant to

the Acts of Congress, in that behalf, personally appeared Gideon M. Freeman, as principal, and United States Fidelity and Guaranty Co. as sureties, and jointly and severally acknowledged themselves to be indebted to the United States of America in the sum of one thousand (1000) dollars separately to be levied and made out of their respective goods and chattels, lands and tenements to the use of the said United States.

The conditions of the above recognizance is such, that, whereas an indictment has been found by the Grand Jury of the United States for the Northern District of California, and filed on the 20th day of April, A. D. 1912, in the District Court of the United States, for said Northern District of California, First Division, charging the said Gideon M. Freeman with using the United States mails in furtherance of a scheme to defraud, committed on or about the 15th day of May, A. D. 1915, to wit, at the District aforesaid, contrary to the form of the statute of the United States, in such case made and provided.

And whereas a verdict of guilty as charged in the indictment was rendered on the 29th day of April, 1915, and on May 15th, 1915, [237] the Court sentenced said Gideon M. Freeman, the defendant, to be imprisoned in the Alameda County Jail, Alameda County, California, for the period of one (1) year, and to pay a fine of \$1000, and in default of its payment to be further imprisoned until said fine be paid, and whereas on October 22, 1915, the Court made its order admitting said defendant to

bail in the sum of \$1000, pending the determination of a writ of error herein allowed.

And whereas, the said Gideon M. Freeman has been required to give a recognizance, with sureties, in the sum of one thousand (1000) dollars for his appearance.

NOW, THEREFORE, If the said Gideon M. Freeman shall personally appear at the District Court of the United States, for the Northern District of California, First Division, to be holden at the courtroom of said court, in the City of San Francisco, when required at ten o'clock in the forenoon of that day, and afterwards whenever or wherever he may be required to answer the said indictment and all matters and said judgment and things that may be objected against him whenever the same may be prosecuted, and render himself amenable to any and all lawful orders and process in the premises, and not depart the said Court without leave first obtained and shall appear for judgment and render himself in execution thereof, and shall render himself amenable to any and all orders herein, then this recognizance shall be void, otherwise, to remain in full effect and virtue.

G. M. FREEMAN. [Seal]

UNITED STATES FIDELITY & GUAR-  
ANTY CO., [Seal]

A Corporation Organized Under the Laws of the  
State of Maryland.

By BRADLEY CARR. [Seal]

Attorney in Fact.

Acknowledged before me the day and year first above written.

[Seal] FRANCIS KRULL,  
United States Commissioner for the Northern District of California, at San Francisco.

[Endorsed]: Filed Nov. 11, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [238]

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*In the District Court of the United States, in and for the Northern District of California, First Division.*

No. 5686.

THE UNITED STATES OF AMERICA,  
Plaintiff,  
vs.  
DR. GIDEON M. FREEMAN,  
Defendant.

**Stipulation Enlarging Time of Defendant to and Including December 20th, 1915, to File Record and Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto, that the time of the defendant herein, Dr. Gideon M. Freeman for filing the record hereof and docketing this case on Writ of Error from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States for the Northern District of California, may be enlarged to and including the 20th day of December, 1915.

JNO W. PRESTON,  
United States Attorney.  
KNIGHT & HEGGERTY,  
Attorneys for Defendant. [239]



*In the District Court of the United States, in and for  
the Northern District of California, First Division.*

No. 5686.

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

DR. GIDEON M. FREEMAN,  
Defendant.

**Order Extending Time to December 20, 1915, to File  
Record and Docket Cause.**

Now, on this day, for good cause shown and pursuant to the foregoing Stipulation,—

IT IS HEREBY ORDERED that the time of the defendant herein Dr. Gideon M. Freeman for filing the record hereof and docketing this case on Writ of Error from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States for the Northern District of California, be and the same hereby is enlarged to and including the 20th day of December, 1915.

Dated November 19th, 1915.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Nov. 19, 1915. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [240]

*In the District Court of the United States, in and for  
the Northern District of California, First Division.*

No. 5686.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DR. GIDEON M. FREEMAN,

Defendant.

**Stipulation for Order Extending Time to January 5,  
1916, to File Record and Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED  
by and between the respective parties hereto, that  
the time of the defendant herein Dr. Gideon M.  
Freeman for filing the record hereof and docketing  
this case on Writ of Error from the United States  
Circuit Court of Appeals for the Ninth Circuit to  
the District Court of the United States for the Nor-  
thern District of California, may be enlarged  
to and including the Fifth day of January, 1916.

JNO W. PRESTON,

United States Attorney.

KNIGHT & HEGGERTY,

Attorneys for Defendant. [241]

*In the District Court of the United States in and for  
the Northern District of California, First Division.*

No. 5686.

THE UNITED STATES OF AMERICA,

Plaintiff,

VS.

DR. GIDEON M. FREEMAN,

Defendant.

**Order Extending Time to January 5, 1916, to File  
Record and Docket Cause.**

Now, on this day, for good cause shown and pursuant to the foregoing Stipulation,—

IT IS HEREBY ORDERED that the time of the defendant herein Dr. Gideon M. Freeman for filing the record hereof and docketing this case on Writ of Error from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States for the Northern District of California be, and the same hereby is enlarged to and including the fifth day of January, 1916.

Dated December 20th, 1915.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Dec. 20, 1915. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [242]

**Certificate of Clerk to Transcript on Writ of Error.**

I, W. B. Maling, Clerk of the District Court of the United States of America, for the Northern District of California, do hereby certify that the foregoing 242 pages, numbered from 1 to 242, inclusive, contain a full, true, and correct Transcript of certain records and proceedings, in the case of the United States of America, vs. Gideon M. Freeman, numbered 5686, as the same now remain on file and of record in the office of the clerk of said District Court; said Transcript having been prepared pursuant to and in accordance with the "Praeceptum" (copy of which is embodied in this Transcript), and the instructions of the attorneys for defendant and appellant herein.

I further certify that the costs for preparing and certifying the foregoing Transcript on Writ of Error is the sum of one hundred thirty-four dollars and sixty cents (\$134.60), and that the same has been paid to me by the attorneys for plaintiff in error herein.

Annexed hereto is the Original Citation on Writ of Error (page 248), and the Original Writ of Error (page 244), with the Return of the said District Court to said Writ of Error attached thereto (page 247.)



IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 5th day of January, 1916.

[Seal]

W. B. MALING,  
Clerk.

By T. L. Baldwin,  
Deputy Clerk. [243]

[Ten Cent Documentary Stamp. Canceled  
1/5/16. T. L. B.]

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*In the District Court of the United States, for the  
Northern District of California, First Division.*

No. 5686.

DR. GIDEON M. FREEMAN,  
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,  
Defendant in Error.

**Writ of Error.**

United States of America,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States, for the Northern District of California, Greeting:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before the Honorable MAURICE T. DOOLING, one of you, between the United States of America, plaintiff and defendant in error, and Dr. Gideon M. Freeman, defendant and plaintiff in error, a manifest error hath happened, to

the great damage to the said plaintiff in error, as by his Complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within [244] thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 22 day of October, in the year of our Lord one thousand nine hundred and fifteen.

W. B. MALING,  
Clerk U. S. District Court.

By Lyle S. Morris,  
Deputy Clerk.

Allowed by  
[Seal]

M. T. DOOLING,  
United States District Judge.

Service of the above Writ of Error made this 22 day of October, 1915, upon the District Court of the

United States for the Northern District of California, by filing with me, the clerk of said court, ~~a duly certified copy of~~ said Writ of Error *to a copy thereof*.

W. B. MALING,  
Clerk of the District Court of the United States, for  
the Northern District of California.

By Lyle S. Morris,  
Deputy Clerk. [245]

Due service and receipt of a copy of the within Writ of Error is hereby admitted this 22d day of October, 1915.

JNO. W. PRESTON,  
U. S. Attorney, and Attorney for Plaintiff.

[Endorsed]: No. 5686. First Division. District Court of the United States, Northern District of California. Dr. Gideon M. Freeman, Plaintiff in Error, vs. The United States of America, Defendant in Error. Writ of Error. Filed Oct. 22, 1915. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [246]

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### **Return to Writ of Error.**

The answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the within Writ of Error.

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this Writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit,

within mentioned, at the day and place within contained.

We further certify that a copy of this Writ was on the 19th day of November, A. D. 1915, duly lodged in the case in this court for the within named defendant in error.

By the Court:

[Seal]

W. B. MALING,

Clerk United States District Court, Northern District of California.

By T. L. Baldwin,

Deputy Clerk.

[Ten Cent Documentary Stamp. Canceled 1/5/16.

T. L. B.] [247]

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*In the District Court of the United States, for the Northern District of California, First Division.*

No. 5686.

DR. GIDEON M. FREEMAN,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

**Citation on Writ of Error.**

United States of America,—ss.

The President of the United States, to the United States of America, and to JOHN W. PRESTON, Esquire, United States Attorney for the Northern District of California, Greeting:

You are hereby cited and admonished to be and



appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a Writ of Error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, wherein Dr. Gideon M. Freeman is plaintiff in error, and the United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 22d day of October, in the year of our Lord one thousand nine hundred and fifteen.

M. T. DOOLING,

United States District Judge.

[Seal]

Attest: W. B. MALING,

Clerk.

By Lyle S. Morris,

Deputy Clerk. [248]

[Endorsed]: No. 5686. First Division. District Court of the United States, Northern District of California. Dr. Gideon M. Freeman, Plaintiff in Error, vs. The United States of America, Defendant in Error. Citation on Writ of Error. Filed Oct. 22, 1915. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk.

Due service and receipt of the within Citation on

Writ of Error is hereby admitted this 22d day of October, 1915.

JNO. W. PRESTON,  
United States Attorney.

[Endorsed]: No. 2734. United States Circuit Court of Appeals for the Ninth Circuit. Gideon M. Freeman, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, First Division.

Filed January 10, 1916.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

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*In the District Court of the United States for the  
Northern District of California, First Division.*

No. 5686.

THE UNITED STATES OF AMERICA

vs.

GIDEON M. FREEMAN.

**Stipulation and Order Extending Time to January  
10, 1916, to File Record and Docket Cause.**

It is hereby stipulated that the time for the defendant to file the record in said cause in the United States Circuit Court of Appeals for the Ninth Circuit, and within which to docket the said cause, be

and the same is hereby enlarged until and including the tenth day of January, 1916.

JNO. W. PRESTON,  
United States Attorney.  
KNIGHT & HEGGERTY,  
Attorneys for Defendant.

Pursuant to the foregoing stipulation it is hereby ordered that the time of the defendant in the above-entitled action within which to file the record in said cause in the United States Circuit Court of Appeals, and within which to docket the said cause is hereby extended until and including the tenth day of January, 1916.

Dated January 5th, 1916.

M. T. DOOLING,  
Judge.

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[Endorsed]: No. 5686. In the District Court of the United States, Northern District of California. United States vs. Gideon M. Freeman. Stipulation and Order Enlarging Time to File Record and Docket Cause.

No. 2734. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to — to File Record Thereof and to Docket Case. Filed Jan. 5, 1916. F. D. Monckton, Clerk. Refiled Jan. 8, 1916. F. D. Monckton, Clerk.

7  
No. 2734

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

GIDEON M. FREEMAN,

*Plaintiff in Error,*

VS.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

## BRIEF FOR PLAINTIFF IN ERROR.

KNIGHT & HEGGERTY,

CHARLES J. HEGGERTY,

Crocker Building, San Francisco,

*Attorneys for Plaintiff in Error.*

Filed this.....day of April, 1917.

APR 7 - 1917

F. D. Monckton  
FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.





No. 2734

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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GIDEON M. FREEMAN,

*Plaintiff in Error,*

VS.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

## BRIEF FOR PLAINTIFF IN ERROR.

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### The Case.

April 20, 1915, an indictment was presented under Section 215 of the Criminal Code, against Gideon M. Freeman, in *five* counts, charging in the *first* count, that Dr. Gideon M. Freeman, alias Paul Allen, doing business at 986 Market Street, San Francisco, under the name of Dr. Jordan, L. J. Jordan Co. and Jordan Museum of Anatomy, a corporation organized under the laws of California, on or about May 15, 1912, under the guise and name of said Jordan's Museum of Anatomy, *devised a certain scheme or artifice to defraud, or for obtaining money or property by means of certain false*

*pretenses, representations or promise to be effected by means of the postoffice establishment of the United States, as follows:*

That Dr. Gideon M. Freeman, alias Allen, *should place or caused to be placed advertisements in newspapers of general circulation published in the United States, or in letters, booklets or other prints, setting forth in substance or effect that said Dr. Jordan was a physician practicing in San Francisco, and specially qualified to treat private diseases of men, among other diseases, syphilis, gonorrhea and diseases and affections arising therefrom, lost vitality, bladder, kidney, prostate and urinary diseases, and had cured numerous persons afflicted with said diseases, and by means of said advertisements, letters, booklets and other prints he, said Dr. Gideon M. Freeman, alias Paul Allen, then and there intended to cause or induce John Bammer, J. P. Millspaugh, George R. Alberts, Anson Ashford and John Caroway, and divers other persons whose names are unknown, and the public generally, to communicate and open correspondence with Dr. Jordan by means of the postoffice, relative to their real or supposed ailments; that when said persons should communicate with him, Dr. Jordan, whom the defendant knew was not a doctor or person existing in life, by the means aforesaid, that said Dr. Jordan should write or communicate with such persons by means of letters placed in the postoffice, in substance and effect stating, with intent to defraud such persons irrespective of symptoms and*

even where they indicated health rather than disease, and without any proper knowledge of their real condition, that they were afflicted with diseases which he, Dr. Jordan, could cure, and he would furnish treatments for the cure thereof, upon payment to him of certain sums of money, and by means of said letters so placed as aforesaid by said Dr. Gideon M. Freeman, he intended to cause or induce all of said persons communicating with Dr. Jordan to deliver or send to the address of Dr. Jordan as aforesaid, sums of money for the purpose of procuring from him medicine or treatments skillfully or properly designed or prepared for the cure or alleviation of such diseases with which said persons were afflicted or had been so induced by said Dr. Gideon M. Freeman to believe they were afflicted, which money he should fraudulently convert or appropriate to his own use, and in return therefor he should send or deliver to said persons so sending or delivering to him sums of money, certain medicine or treatment not skillfully or properly designed or prepared, and of little or no value, for the cure of said persons, said *Dr. Gideon M. Freeman* having *no proper or professional knowledge* of their conditions or whether they were diseased or not or whether said medicine or treatment was capable of benefiting said persons, as he then well knew (Tr. 2-5).

That said Dr. Gideon M. Freeman on July 2, 1912, at San Francisco, for the purpose of executing said scheme or artifice, or in attempting so to do, unlaw-



fully, feloniously, knowingly and willfully, placed or caused to be placed in the postoffice, to be delivered thereby, a certain letter upon which postage had been prepaid, addressed to John Bammer, Colusa, California, a copy of said letter being as follows, to wit, setting out the letter (Tr. 5-8):

The other *four* counts are identical with the *first*, except that the *letter* set out is different, the date of mailing is different, and the person to whom the letter was mailed is different; in the *first* count the letter was mailed to *John Bammer*, in the *second* count to *J. P. Millsbaugh*, in the *third* count to *George R. Alberts*, in the *fourth* count to *Anson Ashford*, and in the *fifth* count to *John Caroway* (Tr. 6-29).

The defendant *demurred* to this indictment upon many stated grounds (Tr. 34-36).

Defendant requested the Court to take the case from the jury, which was denied (Tr. 239-240).

Upon defendant's plea of not guilty, the case was tried, and a verdict rendered finding defendant guilty as charged (Tr. 43).

Motion for a new trial and an arrest of judgment were made and denied (Tr. 44-45).

Thereupon the Court adjudged that defendant pay a fine of \$1000 and *be imprisoned for one year* in the County Jail of Alameda County.

This writ of error was sued out, and the case is thereon before this Court, with defendant's bill of exceptions.

## Argument.

### I.

THE EVIDENCE ESTABLISHES THAT THE LETTERS SET OUT IN THE INDICTMENT AND THE OTHER LETTERS SET OUT IN THE EVIDENCE, THE WRITING AND MAILING OF WHICH ARE CHARGED IN THE INDICTMENT TO BE A VIOLATION OF SECTION 215, CRIMINAL CODE, WERE SOLICITED, ASKED FOR AND REQUESTED BY UNITED STATES POSTOFFICE INSPECTORS IN LETTERS WRITTEN BY THEM AND SENT THROUGH THE MAILS TO DR. JORDAN, AS TEST CORRESPONDENCE; THAT THEY WERE MAILED IN RESPONSE TO THESE INSPECTORS' LETTERS; AND THAT THE ACTS CHARGED WERE INITIATED, CAUSED AND INDUCED BY THE UNITED STATES POSTOFFICE INSPECTORS, AND THEREFORE WERE NOT CRIMINAL AND DO NOT CONSTITUTE A CRIME.

That the evidence in the record demonstrates, upon the express declarations of the Government's witnesses, that *the crime charged* against the defendant in the indictment, under Section 215 of the Criminal Code, because of the facts alleged and the things done, as set out in the indictment, was *initiated and solicited* by the Government, acting by and through G. A. Leonard and Edmond Honvery, its official postoffice inspectors; these inspectors selected the *fictitious* names of John Bamner, J. P. Millspaugh, George R. Alberts, Anson Ashford and John Caroway stated in the indictment, *all fictitious persons*, and through B. D. Beckwith, George E. McMurray, F. D. Crable, F. W. France and W. L. Leonard. *all postmasters* acting under the directions of said Inspectors G. A.

Leonard and Edmond Honvery; who, to quote Inspector "Honvery" (Tr. 117-120), "As part of my business, I supervised certain *tests*, what was called '*test correspondence*', with reference to Dr. L. J. Jordan here, or the Jordan Museum of Anatomy, under orders directly from the chief inspector who was my predecessor under the postmaster. I am now chief inspector. *Upon the initiative* of the chief inspector *this investigation was begun*. This package is a file of *test correspondence conducted by me under the name of* Anson Ashford, Buckley, Washington, *with* Dr. Jordan, 986 Market street, San Francisco. The *first act done* under the name of Anson Ashford *by me* is this paper here, a carbon copy of a *letter*, which was *written by me*: 'Buckley, Wash., Oct. 12, 1912. Dr. Jordan, San Francisco, Cal. Dear Doctor: I have seen your ad. in the papers and as I *would like to consult you* about my case, you could *let me know full particulars about your treatment*. *Hoping to hear from you soon*, I am, Yours very sincerely, Anson Ashford, Gen. Del.' " (Tr. 117-118).

The indictment, in each count, names *five persons*, John Bammer, J. P. Millspaugh, George R. Alberts, Anson Ashford and John Caroway, and charges that defendant *by means of advertisements* placed or caused to be placed in certain *newspapers* of general circulation *published* in the United States, or in letters, booklets or prints, containing certain statements, the defendant *intended to cause or induce* these five persons and others unknown, to

*communicate and open correspondence with Dr. Jordan by means of the postoffice relative to their ailments; that when such persons would communicate with Dr. Jordan he should write or communicate with them by letters placed in the postoffice, and state to them, with intent to defraud them, that they were afflicted with diseases which he could cure and would furnish treatments upon payments of money, and by said letters defendant intended to cause or induce them to send to Dr. Jordan money for medicine or treatments for diseases with which they were or which defendant had induced them to believe they were afflicted, which money defendant should fraudulently convert or appropriate, and in return send them medicine or treatment not skillfully or properly designed or prepared and of little or no value for their cure, the defendant having no proper or professional knowledge of their condition or whether they were diseased or not, or whether the medicine or treatment was capable of benefiting them, as defendant well knew; and on July 2, 1912, for the purpose of executing said scheme and artifice, defendant placed or caused to be placed in the postoffice to be thereby delivered a letter addressed to said John Bammer, which the first count sets out; and on February 25, 1913, a letter to J. P. Millspaugh, which the second count sets out; and on July 15, 1912, to George R. Alberts, which the third count sets out; and on November 2, 1912, to Anson Ashford, which the fourth count sets out; and on*



September 21, 1912, to *John Caroway*, which the *fifth* count sets out.

Now the *evidence* for the Government expressly proves by *Edmond Honvery* (Tr. 117-130), that *he* was a *postoffice inspector*, and as part of his business *he supervised certain test correspondence with reference to Dr. Jordan or the Jordan Museum of Anatomy, getting his orders from the chief inspector* (Tr. 117).

*“Upon the initiative of the chief inspector this investigation was begun. This package purports to be a file of test correspondence conducted by me under the name of Anson Ashford, Buckley, Washington, with Dr. Jordan, 986 Market street, San Francisco.*

*“The first act done under the name of Anson Ashford by me is this paper here, a carbon copy of a letter, which was written October 12, 1912. I will read it,” and the postoffice inspector reads the letter written by him to Dr. Jordan, above copied herein (Tr. 117-119).*

Then follows certain *Anson Ashford* correspondence (Tr. 120-129).

Inspector *Honvery* continues (Tr. 118-120):

*“The original of this letter was put in an envelope, a stamp put on it, addressed to Dr. Jordan, 986 Market street, San Francisco, California, then it was placed with this letter of instructions in an official envelope and sent to the postmaster at Buckley, Washington, with instructions to mail it at Buckley, Washington, and if any reply or any letters were received at Buckley, Washington, addressed to Anson Ashford, General Delivery, they were to be sent to me at Washington, unopened under official*

cover. *In response to that, the first letter received from Dr. Jordan came in an envelope postmarked San Francisco, California, October 5, 1912, addressed to Mr. Anson Ashford, General Delivery, Buckley, Washington. Then followed that a letter postmarked San Francisco, California, October 25, 1912. Then I filled out the symptom blank on October 29, 1912, and sent it to the postmaster at Buckley, Washington, for mailing, accompanied with \$2.50. It was sent by registered mail. I received a return registry card signed by Paul Allen, and a letter mailed at San Francisco, California, November 7, 1912; another letter mailed November 18, 1912; another letter postmarked December 3, 1912, San Francisco, Cal.; a further letter postmarked San Francisco, Cal., December 14, 1912; another letter postmarked December 26, 1912; another letter postmarked January 5, 1913, and a last letter postmarked June 30, 1913. These various letters were received by me under official cover from the postmaster at Buckley, Washington, unopened. I opened them in Washington. I sent out the first letter and the symptom blank and received nine letters. I sent \$2.50 and two postage stamps, \$2.54, and registered the letter. I did not take any treatments. I sent a sample of urine with the symptom blank. The contents of that bottle are water, a little tea, a little ammonia, and glucose. I sent a similar bottle of the same kind of content. There was mixed four ounces of the stuff, and two ounces were sent and two ounces were retained. This is the two ounces that I retained" (Tr. 118-120).*

We continue to quote Inspector *Houvery's* testimony (Tr. 129-130):

"I am not a chemist. Studied chemistry a little bit in school. My object in putting

glucose in this sample was *I tried to show a case with an indication of diabetes*. I thought it would produce evidence of diabetes. The other symptoms are perfectly healthy. *I put ammonia in to imitate the smell*. That is all. That did not indicate anything in the way of disease. I have not consulted any physician or chemist about what constituted healthy urine. *I made the sample to resemble urine* to see whether a proper examination was made of it. *It looked like urine and smelled like urine*—it did, but it does not now. I have not looked at the bottle for some time and I do not know how it smells. There is no formula in my office of instructions as to what chemicals are put in water for the purpose of producing this effect. It is all left to our discretion. What induced me to use these particular ingredients in this water was: My purpose was not to deceive the doctor, but to give him something that looked like urine, and for him to make the proper tests, recognized, of urine. I do not know whether that was the proper amount of sugar that appears in urine in diabetes, but diabetes is a disease which is shown in the urine by excessive sugar. I know that. I tried to introduce that. I also put in ammonia for the purpose of giving some odor; also some tea to give the color. I thought I would produce a liquid that looked like urine and smelled like urine, and had a diabetes condition in it" (Tr. 129-130).

Then follows the *Anson Ashford* correspondence (Tr. 120-129).

*Five postmasters, each and all acting officially, under and by direction of the chief postoffice inspector, B. D. Beckwith, postmaster at Colusa, California, mailed the letters sent him by the chief*

inspector under the name of *John Bammer* (Tr. 49-51); George E. McMurray, postmaster at Cherry Creek, Nevada, the letters sent him under the name *J. P. Millspaugh* (Tr. 51-53); F. D. Crable, postmaster at Flagstaff, Arizona, the letters sent him under the name of *George R. Alberts* (Tr. 53-55); F. W. France, postmaster at Buckley, Washington, the letters sent him under the name of *Anson Ashford* (Tr. 55-56); and W. L. Leonard, postmaster at Oroville, Butte County, California, the letters sent him under the name of *John Caroway* (Tr. 57-60); these *five* postmasters deposited in the postoffice the official test correspondence to Dr. Jordan, soliciting, causing, inducing and in response and in reply to which the *five* letters were sent which are set out in the five counts of the indictment under the *fictitious* names and to the *fictitious* persons above and in the indictment named.

The *test* letters prepared by the Government official postoffice inspector, *soliciting* correspondence by means of the postoffice with and from Dr. Jordan, will be found in the record as follows:

- Letter from John Bammer, Transcript, p. 61;
- Letter from J. P. Millspaugh, Transcript, p. 72;
- Letter from J. P. Millspaugh, Transcript, p. 88;
- Letter from John Caroway, Transcript, p. 92;
- Letter from John Caroway, Transcript, p. 96;
- Letter from John Caroway, Transcript, p. 97;
- Letter from George R. Alberts, Transcript, p. 107;
- Letter from George R. Alberts, Transcript, p. 109;

Letter from George R. Alberts, Transcript, p. 113;  
 Letter from Anson Ashford, Transcript, p. 118;

We respectfully submit that the evidence of the Government shows that the United States Postoffice Inspectors wrote *official* letters sent through the mails to Dr. Jordan asking for and requesting that he send to them through the postoffice, *the very identical letters* which the indictment charges that, because these requested letters containing the information asked for by them, were sent to them, Section 215 of the Criminal Code was violated.

If, under their own *names* and their *official* position as United States Postoffice Inspectors, these Government officers had written the letters that they did write to Dr. Jordan, and the letters and information which their letters called for and requested had been sent through the postoffice *addressed* to these Government officers in *their* own names and with their *official designation* thereon, there can be no possible doubt that the sending of these letters set out in the indictment would *not* constitute a crime under the law or said Section 215 of the Criminal Code. The Government Inspectors themselves expressly swear as witnesses that "*As part of their (my) business*", they "*supervised certain tests, what was called test correspondence, with reference to Dr. L. J. Jordan here or the Jordan Museum of Anatomy. Directly under the chief inspector*" (Tr. 117). That "*Upon the initiative of the chief inspector this investigation was begun*", and that these letters were "*test corre-*



spondence *conducted by them* (me) under the names" stated in the indictment. That "*the first* acts done by them (me) were (are) those (the) letters"; that these *original* letters were sent by them in *official* envelopes to postmasters with instructions to mail them, and send to them unopened the reply under *official* cover; and that "*in response to that*, the *first* letter received from Dr. Jordan came in an envelope addressed to the name they gave" (Tr. 118-119).

In the case of *Woo Wai v. U. S.*, 223 Federal 414, 415, et seq., this Court by Judge Gilbert rendering the opinion, said:

"Woo Wai and his associates, therefore, *although they were not aware of the fact*, were engaged in an act *which was not to result* in an accomplished offense against the laws of the United States.

"Second. We are of the opinion that it is against public policy to sustain a conviction obtained in the manner which is disclosed by the evidence in this case, taking the testimony of the defendants to be true, and that a sound public policy can be upheld only by denying the criminality of those who are thus induced to commit acts which infringe the letter of the criminal statutes. Some of the courts have gone far in sustaining convictions of crimes induced by detectives and by state officers. This is notably so of the decision in *People v. Mills*, 178 N. Y. 274; 70 N. E. 786; 67 L. R. A. 131. But it is to be said, by way of distinguishing such cases from the case at bar, that in all of those cases the criminal intention to commit the

offense had its origin in the mind of the defendant. Thus in *People v. Mills*, it was the defendant who made the first suggestion looking toward the commission of the criminal act, and for the commission of that act the district attorney furnished him opportunity and lent him aid. In the case at bar, *the suggestion of the criminal act came from the officers of the government. The whole scheme originated with them.*"

This same principle of distinction between a decoy and the Government officers *initiating* the crime charged is illustrated in the case of *United States v. Healy*, 202 Fed. 349, where the Court said:

"Decoys are permissible to entrap criminals, *but not to create them*; to present opportunity to those having intent to or willing to commit crime, but not to ensnare the law-abiding in unconscious offending. Where a statute, as here, makes an act a crime regardless of the actor's intent or knowledge, ignorance of fact is no excuse if the act be done voluntarily; *but when done upon solicitation by the government's instrument to that end ignorance of fact stamps the act as involuntary, and excuses, or at least estops the government from a conviction.* In the former case the actor is bound to know the facts, and acts at his peril. In the latter case he is relieved of the obligation *by the government's invitation*, which is of the nature of fraudulent concealment and deceit, and, if not consent, yet doth work an estoppel. Though the seller has violated the statute, *he was the passive instrument of the government, and his is a blameless wrong for which he cannot be justly convicted.*"

## II.

THE EVIDENCE ENTIRELY FAILED TO PROVE MATERIAL ALLEGATIONS OF THE INDICTMENT; AND AFFIRMATIVELY PROVED THE CHARGE MADE IN THE INDICTMENT TO BE FALSE. THERE IS NO EVIDENCE IN THE RECORD THAT DEFENDANT EVER PLACED OR CAUSED TO BE PLACED OR PUBLISHED ANY ADVERTISEMENTS IN NEWSPAPERS, ETC. THERE ARE NO NEWSPAPERS OR ADVERTISEMENTS IN THE RECORD.

The indictment charged that the defendant Dr. Gideon M. Freeman *devised* a certain *scheme to defraud* or obtain money by false pretenses, representations or promise to be effected by means of the postoffice, and charges the *scheme and its particulars* to be, that Dr. Freeman should place or cause to be placed *advertisements in certain newspapers of general circulation published in the United States, or in letters, booklets or other prints, wherein it should be set forth in substance or effect, certain things (specifying them), by said advertisements, etc., then and there intending to cause or induce* Bammer, Millspaugh, Alberts, Ashford and Caroway, and the public generally, *to communicate and open correspondence with Dr. Jordan by means of the postoffice, relative to their real or supposed ailments, and that when they should communicate with said Dr. Jordan, that the said Dr. Jordan should write or communicate with them by means of the postoffice, making certain pretences, representations and promises, whereby Dr. Freeman intended to defraud said persons* (Tr. 3-4).

There is no evidence in the record to prove that Dr. Freeman or any one else, ever placed or caused to be placed or *published* in any *newspapers*, or newspapers of general circulation, or in any letters or booklets or other prints, *advertisements* of any kind or character whatever, or any advertisements, or *advertisements* in letters, booklets or other prints, wherein it should be or was set forth in substance or effect or at all, anyone or more of the things, pretences, representations, promises or statements, *charged* in the indictment, in each one of the five counts, as *constituting the scheme and the particulars of the scheme*, charged to have been *devised* by Dr. Freeman *with intent to defraud by means of* the postoffice.

Therefore, at the outset, there is an absolute failure of proof to establish *the devising of the charged scheme to defraud*. It was not proved or attempted to be proved either in substance or effect, either directly or indirectly, either by the *published* newspaper, letters, booklets or other prints, constituting such *advertisements*, that the defendant, Dr. Freeman, *or any other person*, ever placed or caused to be placed, *advertisements* in certain or any *newspapers* of general circulation *published* within the United States, or *advertisements* in letters, booklets or other prints, wherein it should be set forth in substance or effect, the matters and things charged in the indictment.

*By means of such advertisements*, the indictment charges were the *scheme to defraud devised* by Dr.

Freeman, *intending* thereby to *induce and cause* the said named persons and the public generally, *to communicate and open correspondence with Dr. Jordan relative* to their real or supposed ailments, by means of the postoffice; and *then, when* said persons should *communicate with Dr. Jordan*, Dr. Freeman, *through letters* to said persons by means of the postoffice, intended to defraud them out of money by fraudulent promises to cure them, etc., for money (Tr. 3-4).

These *advertisements* in newspapers *published* in the United States, expressly charged in the indictment, are an essential part of, in practical truth *the entire*, artifice and scheme which the indictment charges. The proof must correspond with the averments, and nothing descriptive of the offense can be rejected as surplusage. This is the settled rule, in other federal jurisdictions and, as well, in the state jurisdictions. In *United States v. Thomas*, 28 Fed. Cas., No. 16,473, the Court said:

“Perhaps it might have been suggested, if the question had been at all argued on the part of the United States, that the indictment states that the nutmegs therein mentioned were imported contrary to law, and that so much of the indictment as states in what the illegality of the importation consisted, may be rejected as surplusage. But the short answer to that is, that this is a part of the description of the offense, and cannot be rejected as surplusage, even if the indictment would have been good if the particular illegality of the importation had not been set forth; for, if an indictment set out the offense with greater particularity than is



required, the proof must correspond with the averments, and nothing descriptive of the offense can be rejected as surplusage (citing cases). But it is believed" the court goes on, "that the indictment would have been bad if the allegations of illegality of the importation had been simply that it was contrary to law—without showing *the facts constituting* such illegality, or stating the *particular illegality* intended to be proved."

In *United States v. Howard*, 26 Fed. Cas., No. 15,403, it is said by Mr. Justice Story:

"But no allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment can ever be rejected as surplusage."

In *United States v. Brown*, 3 McLean 233, the Court said:

"If the prosecutor choose to state the offense with greater particularity than is required by the statute, he will be bound by the statement, and must prove it as laid."

An application of this doctrine, the strictness with which it is insisted upon, is furnished by an eminent judge, Mr. Justice Curtis, in *United States against Foye*, 25 Fed. Cas., No. 15,157. Mr. Justice Curtis says:

"But a far more difficult question arises under the other part of the objection. The indictment alleges, not only that this letter was intended to be conveyed by post, but describes where it was to be conveyed; it fixes the *termini* as Georgetown and Ipswich. The allegation is,

in substance, that the letter was intended to be conveyed by post from Georgetown to Ipswich. The question is, whether the words, from Georgetown to Ipswich, can be treated as surplusage. It was necessary to allege, that the letter was intended to be conveyed by post. The words, from Georgetown to Ipswich, are descriptive of this intent. They describe, more particularly, that intent which it was necessary to allege. In *United States v. Howard* (Case No. 15,403), Mr. Justice Story lays down the following rule, which we consider to be correct: 'No allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment, can ever be rejected as surplusage'. Apply that rule to this case. It is legally essential to the charge to allege some intent to have the letter conveyed somewhere by post. Suppose the indictment had alleged an intent to have it conveyed between two places where no postoffice existed, and over a route where no post-road was established by law. Inasmuch as the court must take notice of the laws establishing postoffices and post-roads, the indictment would then have been bad; because this necessary allegation would, on its face, have been false. Words, therefore, which describe the *termini* and the route, and thus show what in particular was intended, do identify the intent, and show it to be such an intent as was capable, in point of law, of existing.

"And we are obliged to conclude that they cannot be treated as surplusage, and must be proved, substantially, as laid. We are of opinion, therefore, that there was a variance between the indictment and the proof; and that, for this cause, a new trial should be granted."

In *Potter v. United States*, 155 U. S. 438, 445, the Supreme Court said:

“It is generally true as claimed that where an indictment is unnecessarily descriptive, even the unnecessary description must be proved as laid.”

And the Court indicates that the general rule invoked, was not in point, and for the reason that it was not necessary to prove the descriptive matter “otherwise than as it is stated”. Said the court, to make the statement complete:

“It is generally true, as claimed that *where an indictment is unnecessarily descriptive, even the unnecessary description must be proved as laid*; but that proposition does not seem to be in point, for it is not claimed that the testimony did not show just such a writing as is charged to have been made by the defendant, and surely it cannot be claimed that *unnecessary matter of description* must be proved *otherwise than as it is stated*.”

See also

*United States v. Porter*, 3 Day 283, 285-6.

The same rule obtains in the state jurisdictions:

“It is a rule of practice which obtains in criminal as well as civil actions that the allegations upon which the action is founded and the proof adduced must meet and correspond. It is a further rule well settled and established that, where a particular fact or circumstance is alleged as constituting or forming a part of the descriptive identity of the offense charged, the prosecution is held and limited to that particular state of facts in the proofs adduced to establish the crime; and, further,

the court in its charge to the jury is also limited to the matter charged as constituting the offense, and that to submit to the jury in the charge other matters constituting the offense which are not alleged is a radical and fundamental error, which will necessitate a reversal because this court cannot ascertain in such case whether or not the party may not have been convicted on matters not charged against him in the indictment or information. In other words, where the allegation is descriptive of the offense, the guilt of defendant must be found, if at all, upon the ground alleged in the information or indictment.”

Randle v. The State, 12 Tex. Cr. App. 251;

Clark v. Commonwealth, 55 Ky. 213, 214;

Commonwealth v. McGowan, 58 Ky. 369, 370;

State v. Newland, 7 Iowa 242;

Helmerking v. Commonwealth, 37 S. W. 264,  
265.

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### III.

#### Errors in Rulings on Trial.

**THE TESTIMONY OF THE WITNESS WALKER WAS NOT ADMISSIBLE, AND SHOULD HAVE BEEN STRUCK OUT ON DEFENDANT'S MOTION.**

H. C. Walker testified for the Government, that he resided in San Jose for about nine years; that he was 52 years old. “ *I visited* the place here in San Francisco known as the Jordon Museum. Prior to visiting that place I had correspondence with the institution.”

## FIRST:

"Mr. FAIRALL. Q. Is this for the purpose of showing a *similar* offense?"

Mr. PRESTON. Yes.

Mr. FAIRALL. We object to it upon the ground that no offense has yet been shown against this defendant, and until that fact is established, *similar* offenses cannot be shown. We therefore object upon the ground that it is immaterial, irrelevant and incompetent and is violating one of the fundamental rules of evidence and the rights of defendant to introduce such evidence" (Tr. 131).

"The COURT. Objection overruled. Exception" (Tr. 131).

The witness then testified that he could not tell how many letters he wrote; he guessed about three, and that one letter shown him was a copy of one he wrote; that he did not keep copies of the letters he wrote the institution; that he received replies to these letters; and he then identifies letters received by him from Dr. L. J. Jordan.

He received *cards* from the Dr. Jordan Company—Dr. L. J. Jordan. *Visited* the place eight months after the first correspondence, and again several months later, and seven or eight times in all, probably *ten* times.

"I commenced this *treatment* in September, 1912, and quit doctoring there before the holidays of 1914. I filled out the question and symptom blank and sent them back. I told them I was troubled with a weak back, that was my main trouble, and then afterwards *I began to take medicine. I took it for about eight months* before I visited them and *then came*



down to visit them, and there was a *doctor there* examined me, and told me that my case was more complicated than he thought before, and I would have to take a different treatment. My condition had not improved any during the eight months. I paid them about \$200. to \$280. I am not positive about the man who examined me when I went there. There was a man that looked very much like Dr. Freeman. *I am not positive it was Dr. Freeman.* It was a man that looked very much like him. I only saw the man twice. He was a stout heavy-set man. That is all I know. He did not tell me his name. *I was examined* in their inner office. When I went there I called for Dr. Jordan, and he said that the doctor was not in, to wait a few minutes, and this gentleman came to the door and asked me into the room. That gentleman *examined* me. He told me *I was troubled with prostate glands* and sexual weakness. He said my case was stubborn and required more expensive medicines, and he wanted me to pay \$100. for treatment. I did but not at that time. I told him I did not have the money then, and he wanted me to pay a part down and pay installments. I did not do anything then. I went home. A few days later he wrote me a letter regarding that I was leaving it alone too long, and not taking up the treatment, so I made up my mind that I would try it again, and I commenced treating and *treated on for several months again.* I went back and *was treated the next time by Dr. Rice.* I did not see the man *who had treated me before.* I told the door-keeper I wanted to see Dr. Jordan, and he told me he would be in in a few minutes. He did not mention any name. I went into the waiting room and waited for him. After I was there probably 20 minutes, there was a man came to the door from the opposite room and called me

into the office and made an examination. *I did not make any inquiries about Dr. Jordan*" (Tr. 130-134).

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## SECOND.

"Mr. PRESTON. We offer to read a part of this correspondence.

Mr. FAIRALL. We move to strike out all of this testimony upon the ground that it does not show a circumstance in this: that the evidence shows that this man *took the treatment in person, and after a personal examination*, and there is no similarity between the cases at all" (Tr. 134).

The motion was denied and exception was taken.

This witness, H. C. Walker, continued:

"I sent real urine; obeyed instructions just as I got them. I took the medicine, having received a great deal of it. I followed the instructions of the doctor. I went one time to the office and had an examination. He did not give me much of an examination. *He tested my urine, and examined my lungs and back, the prostate glands.* That was some examination. *He examined my prostate gland with his finger.* He examined the prostate gland with his finger *through the rectum*, and said I had enlarged prostate glands. He did not explain why he examined me for that purpose. Mr. Robinson was the doorkeeper there. *He looks a great deal like Dr. Freeman.* That is the man that was at the door, I think. That was not the man that examined me. *I do not pretend to say that it was Dr. Freeman that treated me.* I wrote to the Dr. Jordan Museum" (Tr. 143-146).

## THIRD.

“Mr. FAIRALL. We wish now to renew our *motion to strike out* this testimony on the ground that it shows an entirely different state of facts. It is not within the time alleged in the indictment, and it is *based upon treatments, personal interview* and personal examination of the urine, and *personal examination of the patient* in the office, and it would not show a similar act, because it is not similar; it has nothing to do with the same conditions; this treatment, so far as it appears here, is in actual, absolute good faith; there is nothing here to brand these statements as false or fraudulent, or made for the purpose of defrauding. Apparently on its face and so far as appears from the testimony, the statements were made in absolutely good faith for the treatment of the patient” (Tr. 145-146). Denied; exception.

“Mr. FAIRALL. Q. *You were in fact suffering* from this trouble which was mentioned in this complaint to the doctor, were you not?

A. *Yes.* But I do not know that I was suffering exactly for what they were treating me. I was suffering from a weak back, and they claimed sexual weakness also. I did not claim so. It is not a fact that I have suffered from sexual weakness but very little. I may have suffered some time” (Tr. 146).

There is *no evidence* that any of *these letters* allowed to be read during *Walker's* testimony, was ever mailed or deposited in or delivered by *the post-office or through the United States mails*; and therefore, these letters were erroneously admitted and were prejudicial to defendant.

The witness Walker testifies to writing and receiving letters showing correspondence with the

Dr. Jordan Museum; but there is not a word in his testimony showing that he received these letters or any of them through the postoffice, or that they ever were mailed or deposited in the postoffice.

Again, the testimony of Walker was inadmissible, because his case was and his testimony showed, the actual examination and treatment by doctors of Walker, and that he was actually ill and suffering from his ailments and was given and took treatment and medicine therefor.

The objections should have been sustained and Walker's testimony should have been struck out on the several motions of defendant to that effect.

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#### IV.

**THE EVIDENCE OF THE WITNESS BOERNER WAS INADMISSIBLE. HIS TESTIMONY WENT ONLY TO MATTERS OCCURRING BETWEEN MAY, 1909, AND OCTOBER, 1910, WHILE THE CHARGES IN THE INDICTMENT INVOLVE THE PERIOD BETWEEN JULY, 1912, AND AUGUST, 1913. THE VARIOUS OBJECTIONS OF DEFENDANT TO PARTS OF THIS EVIDENCE SHOULD HAVE BEEN SUSTAINED.**

Edward *Boerner* testified for the Government, that between May 5, 1909, and October, 1910, he was employed by the Jordan Museum as stenographer and cashier (Tr. 147). That he got his instructions from *Paul Oesting* as to carrying on the business (Tr. 149). Could not say whether Dr. Freeman ever examined the books. License was issued

in name of G. M. Freeman (Tr. 150). Dr. Freeman had access to the books if he wanted to look at them. The *local* business was the greatest. I could not say that Dr. Freeman ever looked at the books (Tr. 157). *Mr. Oesting* generally told me what to put in the letters (Tr. 160).

“Dr. Freeman was *not* present when that *form* of letter was made. He *never* instructed me at all about these letters. I think he prescribed for a patient once during the year I was there. He prescribed for some one who called at the office. It was *not* in regard to sending out letters by mail. *He had nothing to do with that*, so far as I know” (Tr. 163).

“*Most of their business was done through calls at the office*; quite a few of the cases went through the mail, a good many. The major portion of the business, that is, in money, came locally” (Tr. 163).

“I do not remember of his giving instructions to employees in the management of the business, or of his taking any part in things of that kind. He did not have an office of his own there. Paul Oesting appeared to be the one from whom we took our instructions. We would go to him if we wanted any instructions” (Tr. 164).

“I do *not* remember that *Dr. Freeman ever instructed me to send out letters*” (Tr. 164).

The evidence of this witness was inadmissible and prejudicial, and the objections made and motions to strike out should have been sustained.



## V.

THE MOTIONS OF DEFENDANT AT THE CLOSE OF THE GOVERNMENT'S CASE TO STRIKE OUT ALL OF THE EVIDENCE, AND TO TAKE THE CASE FROM THE JURY, SHOULD HAVE BEEN GRANTED; BECAUSE A FAIR CONSIDERATION OF ALL THE EVIDENCE DOES NOT PROVE THE GUILT OF DEFENDANT, AND ITS ONLY TENDENCY IS TO SHOW THAT HE IS INNOCENT OF THE CRIME CHARGED AGAINST HIM.

At the close of the Government's case the defendant moved the Court to strike out all of this evidence and to take the case from the jury, as follows:

“MR. FAIRALL. Now, if your Honor please, we desire to make a motion on behalf of the defendant for the purpose of the record. We move that the Court now strike out the testimony upon the ground that they have in no way connected the defendant with the commission of the alleged offense, and that they have not shown nor attempted to show that he sent any of the letters mentioned in the indictment, knew of their being sent, ever heard that they had been sent, or in any way assisted or aided or abetted or encouraged anyone else in sending them, or that he had anything to do with sending them. Upon the further ground that no connection has been made between him and the management of this business, other than the fact that he was an officer of the corporation, that he drew the dividends which came to him as a stockholder of the corporation, and that he had no knowledge whatever of the transaction or manner of the transacting of business; upon the further ground that there has been no attempt to show that he ever saw any of these letters, that he ever handled them, that he ever gave any instructions about sending them, that he ever consulted, or that he

ever advised or ever knew of their being sent; for that reason, we think the testimony has always failed to connect him with the commission of any offense. I understand it to be the law that a defendant charged as this defendant is charged, not as a part of a conspiracy, but as an individual defendant, in order to connect him with the perpetration of the crime, a state of facts must be shown which proves or at least tends to prove that he not only had the opportunity which counsel has shown or attempted to show with much elaboration here, to commit a crime, but that he actually knew that a crime was being committed; knowledge must be brought home to him of the commission of the crime, or if he did not actually assist in the perpetration of it, it was carried on with his connivance and consent. I think that is a very liberal statement of the law. None of these things in any way, shape, or form have been shown.

The COURT. The motion will be denied.

Mr. FAIRALL. I except. We now move upon the same grounds that the case be taken from the jury for the reason that none of these acts have been shown, and there is no evidence which in the slightest degree tends to support the claim of the prosecution that the defendant was in any way connected with the commission of this offense.

The COURT. That motion also will be denied.

Mr. FAIRALL. Exception" (Tr. 238-240).

These motions should have been granted, as there is no evidence in the record connecting Dr. Freeman with the preparation, sending out or mailing of any of the letters in the indictment or in the record, or with devising any scheme or artifice to defraud, or using the mails or the postoffice to that end, or aided,

abetted, counseled, commanded, induced or procured the commission of the crime charged.

There is not sufficient evidence in this record to show that, considering all of the evidence in the record, that any *crime* or violation of Section 215 Criminal Code was committed.

The whole evidence proves, not only that Dr. Freeman is not guilty of any crime, but that the allegations of the indictment were not proved.

The indictment charges that it was intended by Dr. Freeman to defraud each of said persons *irrespective* of the symptoms communicated and even in cases where the symptoms indicated health rather than disease, and without any proper knowledge of the condition of said persons, that they were afflicted with diseases which he, Dr. Jordan, could cure, and would furnish treatments for the cure of such alleged diseases, upon payment of money, to procure medicine or treatments skilfully or properly prepared or designed for the cure or alleviation of the diseases with which they were or had been induced by Dr. Freeman to believe they were afflicted, and in return for such money, Dr. Freeman should fraudulently appropriate the money, and send to them certain medicine or treatment not skilfully or properly designed or prepared, and *of little* or no value for the cure of said persons, said *Dr. Gideon M. Freeman* then and there having no proper or professional knowledge of such person's condition or whether they were diseased

or not, or whether said medicine or treatment was capable of *benefitting* said persons, as he well knew (Tr. 4-5).

Now take the proofs of these charges and it is obvious that the charges are not proved, but on the contrary, it is shown that *no medicine or treatment was ever sent* to any of these persons at all—Inspector *Honvery* (Tr. 119) did not take any treatments, but did send a sample of *urine* with the symptom blank, and says he made up the fluid with water, tea, ammonia and *glucose*; that *he tried* to show an indication of *diabetes*, and put in glucose, and ammonia to imitate the smell; that his purpose was to produce something that looked like urine, smelled like urine, and had a diabetes condition in it (Tr. 130). The letter in reply (Tr. 122-123), states the urine shows sugar, and a condition of diabetes, advises that the answers to symptoms 16 and 22 (Tr. 120-121) “dreaming off nights”, and “emissions of semen at night with dreams”, shows weak condition which should not be allowed to continue, and advises him to get the services of a competent and reputable physician, whether he treats with Dr. Jordan or not (Tr. 123).

Inspector *Leonard* illustrates under the name of John Caroway, a similar result. He sent urine and reply informed him analysis was not satisfactory, same as ordinary water (Tr. 100), and to send another sample, which he did, of water, tea leaves, ammonia and *adding* to this sample *salt* (Tr. 96-97),

and received reply that it indicated albuminous material present, probably indicating waste energy and excessive losses of vital fluids (Tr. 100). And under name of J. P. Millspaugh, a like result, showing competent analysis of urine (Tr. 80-81).

The witness *Dr. Fletcher McNutt* (Tr. 196-200), explains great difficulty of ascertaining whether urine is or not urine (Tr. 197), and says: "If a man patient were to send me a bottle of liquid that *looked* like urine, without testing it to find out whether it was or not, *I would assume that it was*" (Tr. 199).

Dr. Freeman, the defendant, was educated at Lake Forest College in North Carolina, was a soldier in the Civil War, and *graduated* in medicine in 1873, and practiced medicine over *thirty* years (Tr. 250).

No treatments were ever had by any of these persons, and no medicines were ever sent to any of them. Of course, these *five* persons named in the indictment and in these letters were *fictitious* persons, and these five *names* only were assumed by the Government postoffice inspectors in carrying on this "*test correspondence*" (Tr. 117-118).



## VI.

**THE EVIDENCE IS INSUFFICIENT TO JUSTIFY THE VERDICT AGAINST DR. FREEMAN, AND DOES NOT JUSTIFY A CONCLUSION THAT HE DEvised THE SCHEME TO DEFRAUD BY MEANS OF THE POSTOFFICE CHARGED IN THE INDICTMENT, OR THAT HE EVER DID A CRIMINAL ACT, OR WAS IN ANY WAY CONNECTED WITH OR HAD KNOWLEDGE OF ANY SUCH SCHEME OR ACTS AS CHARGED IN THE INDICTMENT, AND THE EVIDENCE SHOWS THAT HE IS INNOCENT OF THE CRIME CHARGED AGAINST HIM.**

There is no evidence in the record that Dr. Freeman was ever guilty of or committed a wrongful or criminal act, or that he ever did, or aided, abetted, counseled, commanded, induced or procured the commission of any one of the acts charged against him in this indictment; and there was no proof produced upon his trial that would or could justify, either to a moral certainty or beyond a reasonable doubt, that Dr. Freeman ever committed any violation of Section 215 of the Criminal Code or did or had any knowledge or information of the doing of the acts and things shown by the evidence, either in connection with any of the matters and things to which the postmasters and postoffice inspectors, or any of the other witnesses, testified upon the trial.

FIRST. He was a large stockholder and the nominal secretary of the corporation created and existing under the laws of California under the name, "Dr. Jordan, L. J. Jordan Co. and Jordan's Museum of Anatomy", as alleged in the indictment (Tr. 2); and the Court charged the jury that,

“In order to render an officer of a corporation personally liable in a criminal action for the acts of the corporation, such officer must have *participated* in some way as heretofore explained, *in such criminal act*. The mere performance of the duties of secretary of a corporation, or the acceptance of dividends, or both combined, *cannot* render an officer of a corporation *criminally* liable for an *act* committed by another *of which he had no information or knowledge before* its commission.

“A principal is *never* liable criminally for the act of his agent *unless* committed by direct command of the principal or with his consent. But *consent* which will render the principal liable for the act of his agent *must* be consent based on a *knowledge* of the *act about* to be committed by the agent. It *must be shown here* in order to warrant a conviction that defendant had knowledge of the fraud, if you find that fraud was committed, and that having such knowledge, he either actually participated in the offense, or as stated, aided, abetted, counseled, commanded, induced or procured such commission. The *mere opportunity* to have knowledge, without further circumstances, is not equivalent to actual knowledge” \* \* \* (Tr. 280).

This charge being not only the law of the case, but absolutely and accurately correct in law, we proceed to point out that Dr. Freeman had no information or knowledge of any of the acts or things charged to be fraudulent and criminal, never consented to them, never participated in them, nor did he aid, abet, counsel, command, procure or induce such commission.

SECOND. The Government proved that Dr. Freeman was *certified* as a Doctor of Medicine by the “*College of Physicians and Surgeons*”, Baltimore, in 1873, and by the “*Medical Society of California*”, in 1877 (Tr. 187-188), and, by his own testimony, that he was *born* in North Carolina in 1849, was *educated* at Lake Forest College, in North Carolina, was a *soldier* during the Civil War, *graduated in medicine* in 1873, came to California in 1875, and has been here ever since, *practicing medicine* something like *thirty* years, and at time of trial was a member of the City and County Medical Society and the State Medical Society, general practice, mostly a surgeon (Tr. 250).

Fifteen or sixteen years before the trial, Dr. Freeman *bought an interest* in this Jordan Museum; began to retire about 1906, and absolutely a year or two after that, and never practiced since.

That he had *no duties* in connection with the Jordan Museum, except as secretary, and paid no attention to the business. Everything was brought to him and passed on, and he would sign anything that was brought up, nothing more. Paul Oesting mostly did the business. Dr. Freeman did not have the slightest thing to do with the management; he did not employ the doctors; in a general way he knew about the business, but not as to the details, and never inquired; went there occasionally, sometimes every day or two, stayed five minutes and saw if there was any of his personal mail; sometimes away a month, a week, two weeks; it was not neces-

sary for him to be there; he did not open the mail or have anything to do with the mail business; never directed the kind of letters or knew anything about the character of letters that were being sent out; he never examined the form letters that have been spoken of here and knows more about them now than he ever knew before; have not read them, but just heard them read; he never directed the sending of such letters to anyone; he did not know that they were sent out, letters of that character; was not cognizant at any time that these letters such as have been used here and shown here were being sent to people throughout the State by means of the mail; the doctors who were employed did not consult him about the treatment of patients or what they should do.

“I never dreamed that I was committing fraud upon anyone by being connected with that institution. I was in good faith there”; it had been established in 1870 or 1875, and he never dreamed there was anything wrong; he never entered into any plan or scheme or device with anyone for the purpose of defrauding anyone in the treatment of the sick or the afflicted; he never entered into any scheme for that purpose under the guise of the Jordan Museum of Anatomy or anything of that kind; he did not go into that business for the purpose of deceiving or defrauding the public.

“The Jordan Museum of Anatomy was a regular museum with wax figures and invited people to visit it. An admission was charged, which was collected at the door. They

published a book at that time. During all these years it seemed to me one of the places of interest in San Francisco. This is the book that Dr. Jordan prepared, and as far as I know it was prepared in the museum when the museum came. I had it reprinted. No one previous to this time ever took any offense at that or said they were being defrauded by it. That was sold at all the book stores as well and was passed upon by the postal authorities. The book was published and circulated by the Jordan Museum people at that time, described in a medical way the effects of self-abuse and syphilis and other diseases, and besides we had the figures of wax in the museum illustrating it. It had a catalog at the end of each piece describing what it was, and people coming there and viewing these wax figures saw the effects of disease upon the human system. In those times there were doctors there who were connected with the institution who treated the diseases. Dr. Jordan was not of them in those days, but Dr. Hastings was. Dr. Jordan brought this museum from Australia about 60 or 65 years ago and sold it to the Dr. Hastings Estate, and Dr. Hastings finally died. Dr. Hastings was one of the best surgeons here in his time. Paul Oesting was in it and I bought an interest in it for \$10,000; it was then valued at \$30,000."

"In connection with the treatment of the diseases, the exhibition of these figures, there were doctors, and I was one of them at that time who treated patients who called at the office. I guess I was connected with the treatment of diseases about four or five years. I was actively engaged for four or five years, and better work I never did in my profession than while I was there. I made a great effort, and was as conscientious as could be with my patients. I made a conscientious endeavor to treat patients honestly and fairly and give them the best skill that I had. I did



just the same as I did when I was in general practice, absolutely. During the time I was there, I do not think any of these form letters were used. I have tried to think it over, but I have never heard of one until I saw that there. I never used them. I did not have anything to do with the making up of them, nor did I advise anyone as to how they should be constructed or what should be said in them, or in the use of them in any way, shape or manner. Those things grew up in that business after I retired. I heard of them in a general way, but I thought they were always to be used when he had an incompetent stenographer (Tr. 255).

"I never knew they were to be used regularly. If anybody had told me that the letters were used that were here yesterday, I would have surely told them that it was not true, for I never knew that such letters were written; I thought that the stenographer did the work himself. I thought the doctor dictated the matter to the stenographer, who wrote the letters. I never in my life treated a patient by mail, and said that I had examined the urine, when I had not, or said that his condition was one thing, when I believed it to be another, or say that he was sick when I knew that he was well" (Tr. 256).

The testimony of Dr. Freeman is too lengthy to quote in full, but the foregoing substantially states his case. The entire testimony of Dr. Freeman will be found in the Transcript, pages 250 to 275.

THIRD. The Government's witnesses, testifying in relation to Dr. Freeman, say:

*Edward Boerner*—that he was employed by the Jordan Museum from May 5, 1909, to October, 1910, *three years before* the charges in the indictment.

and his duties were stenographer and cashier, and his office in the Jordan establishment (Tr. 147).

“I got my instructions from Paul Oesting (Tr. 149). I could not say positively whether Dr. Freeman ever examined the books. When he would visit the place he would come around, sit down, sometimes in the patients’ room, sometimes in the office where I was. Sometimes he would stay an hour or two, and then not long at all (Tr. 150). Dr. Freeman had access to the books if he wanted to look at them. I could not say if he ever did (Tr. 157). I received instructions from Paul Oesting; he was not a doctor. Dr. Freeman was a doctor. Oesting told me what my duties were and the important things in the office (Tr. 158-159).

“The letters were kept there, they were stereotyped letters, and some of them had been there for six months. I bought them from W. R. Whyte. I used to sign the letters with the name of Dr. Jordan. *Mr. Oesting* told me generally what to put in. He did not tell me very much, just to be careful what to write, in a jocular sort of a way, and keep out of trouble (Tr. 160). Robinson and White sent the medicines (Tr. 161).

“Dr. Freeman was *not* present when that form of letter was made. He *never* instructed me at all about these letters. He prescribed once for some one who called at the office; it was not in regard to sending out letters by mail. *He had nothing to do with that*, so far as I know (Tr. 163). He did not have an office of his own there. *Paul Oesting* appeared to be the one from whom we took our instructions. We would go to him if we wanted instructions. I do not remember that Dr. Freeman ever instructed me to send out letters (Tr. 164). I do not remember of ever getting any instructions from Dr. Freeman at all as to taking advantage

of anyone or defrauding anyone or doing anything wrong" (Tr. 166).

*James T. Burns*, as a witness for the Government, testified:

"During 1912 and 1913 (this is the indictment period), I was employed by the Dr. L. J. Jordan Company in the capacity of stenographer and clerk, from May, 1911, up until the the place was closed. My position was virtually the same as that of Mr. Boerner. I practically *carried on all of the correspondence in the place* (Tr. 167-168). Dr. Freeman came into the office I was located in, and the books were accessible to him. *He very rarely, to my knowledge, if at all, looked over these books at any time.* He would come to the office during the day; he would not stay very long; these letters were accessible to him (Tr. 168).

"I did not send any of these stock letters at the request of Dr. Freeman. I did send some of them away to different patients, different prospective patients; I know Dr. Freeman had access to these stock letters (Tr. 180). I signed the name Dr. L. J. Jordan to some of the correspondence that went out during the time I was there. There was no Dr. L. J. Jordan connected with that institution while I was there. There was no one who posed as Dr. L. J. Jordan (Tr. 181).

"I was not instructed by Dr. Freeman about the writing of any of these letters, and he never gave me any instructions of any kind or nature. He was there frequently and infrequently, sometimes stayed fifteen minutes, sometimes longer. Frequently he did not come for days" (Tr. 183-184).

"Dr. Freeman and Paul Oesting were not on very friendly terms; they did not speak. I noticed they were unfriendly and that *Oesting*

*was running the business then as a rule. We took our instructions from Oesting regarding the business end, regarding the conduct of the business. The conduct of the business, the carrying on of it and the treating of the patients, that portion of it I did not consult Dr. Freeman about at all. The only thing that I consulted Dr. Freeman about would be in the absence of Mr. Oesting as to payment of a bill for drugs or something of that kind; anything that came up in a business way that I could not handle myself, like rent, bills for supplies and drugs (Tr. 184).*

*“Dr. Freeman came rather infrequently. I do not know that Dr. Freeman knew of the existence of these stock letters at the time I first went there” (Tr. 189).*

Now this witness—James T. Burns—was the stenographer and clerk during the very period that the indictment charges the mailing of these letters, he was there from May, 1911, until the Museum was closed (Tr. 167); and the letters in the indictment commenced July 2, 1912 (Tr. 6) and the last was February 25, 1913 (Tr. 12); and this witness everywhere in his testimony exonerates Dr. Freeman from any connection with the writing, or sending or mailing or knowledge of any of these letters.

*Dr. Harry McGarvey*, testifying for the Government, said he was employed in 1914 at Dr. L. J. Jordan's, Incorporated (Tr. 211), although stating that “I have no great friendship for the people connected with Jordan's” (Tr. 219), testifying concerning the ailments and treatment of the Government's witness, H. C. Walker (Tr. 130-147), said:

*“This man Walker—he had rheumatism and some prostatic trouble, a little prostatic enlarge-*



ment, to the best of my knowledge. There was nothing wrong with his sexual manhood that I know of, or anything to indicate it. *He was treating* with the institution while I was there. My recollection is he was getting a solution of salicylate of soda for his rheumatism and a tonic containing a tincture of iron. To my knowledge, he was not receiving any treatment for lost manhood.

The rheumatism was located in his shoulders, arms, I believe. It was not in his back. He always complained of trouble in his arm and shoulder. I did not examine him to start with I *examined* him afterwards *and treated him*, but during the time he was coming to the Jordan institution, I simply followed the instructions of Dr. Rice in regard to his treatment. I do *not mean to say* that the medicines prescribed would not be of any benefit for his rheumatism. They would be of benefit to him. The remedy I mentioned is one that is used in the treatment of rheumatism, usually used. He has muscular rheumatism, what is known as that. He was able to walk when I found him. He complained of the rheumatism bothering him considerably. I could not say that he improved any afterwards. Sometime when he called he said he was feeling better, other times he said he was not so well. Eventually I prescribed different treatments for him. To the best of my knowledge, I treated him honestly and give him the best treatment I could. I was acting in good faith with him. So far as I know, *Dr. Rice was acting in good faith with him*, so in that particular case *there was no fraud* as far as I know" (Tr. 221-223).

The foregoing is, in substance, the *only* evidence in the record as to Dr. Freeman.

Upon this testimony from *the witnesses for the Government*, relating to the connection of *Dr. Free-*



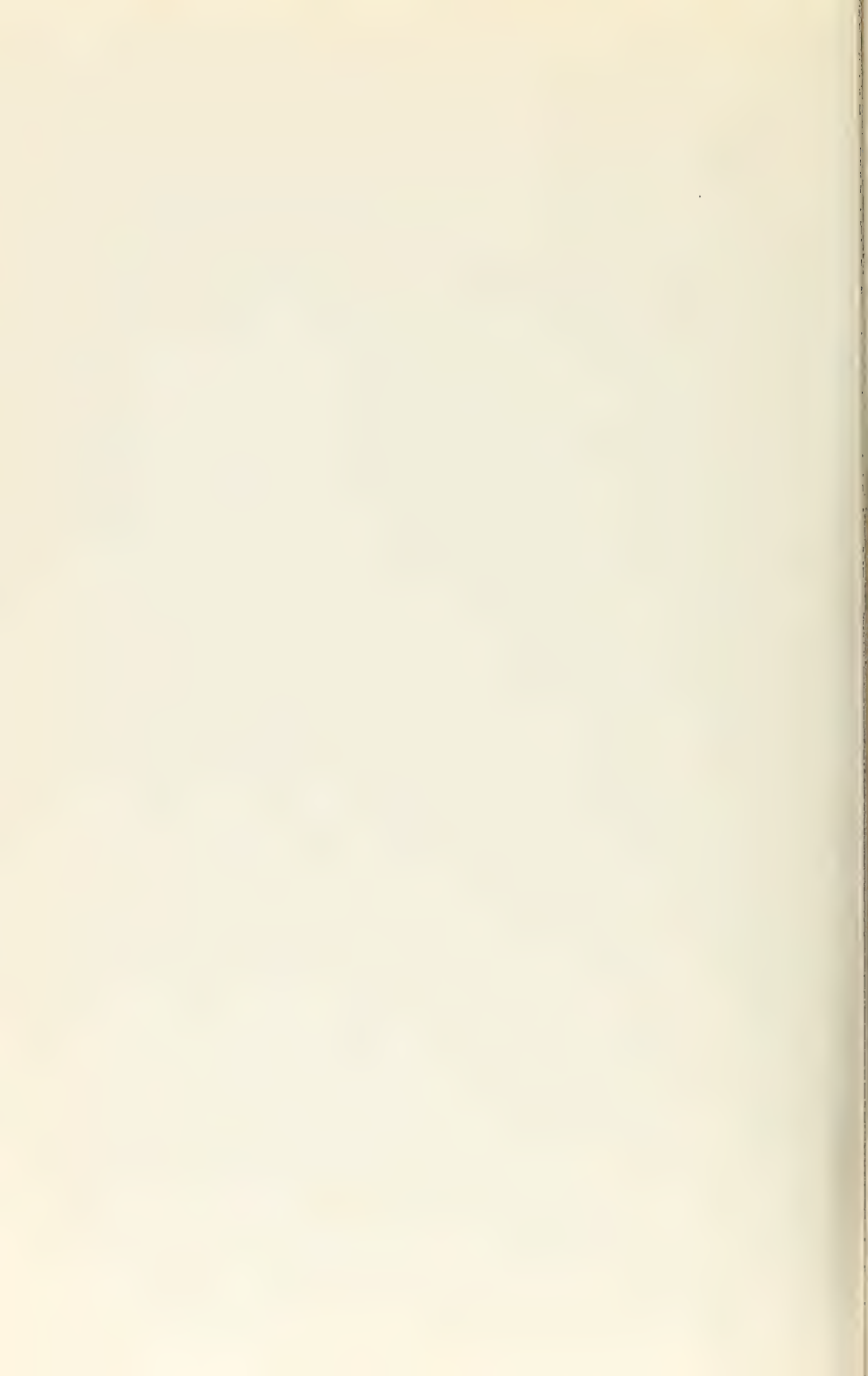
*man* with these charges, always eliminating him from any knowledge, information, direction of the business or connection with its details, and nowhere a word showing that Dr. Freeman had any even censurable connection with the acts and things charged against him as a violation of Section 215 of the Criminal Code, or any of these letters or treatments; we respectfully submit that the evidence was clearly insufficient upon which to support the verdict and judgment against him, and we also respectfully submit that this evidence of the Government, fairly and even to a moral certainty, shows Dr. Freeman to be *innocent* of the crime charged against him.

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## VII.

IN THE EVENT THAT THE COURT SHOULD DEEM THAT THE GOVERNMENT HAS TECHNICALLY SUFFICIENTLY CONNECTED DR. FREEMAN WITH THE ACTS AND THINGS DONE TO SUSTAIN THE VERDICT, BUT SHOULD BELIEVE THE EVIDENCE DOES NOT SHOW HIS MORAL CULPABILITY TO THE EXTENT THAT HE SHOULD SUFFER IMPRISONMENT AND FINE, WE APPEAL TO THE COURT TO CONSIDER HIS AGE, THAT HE WAS NOT AN ACTIVE PERSONAL PARTICIPANT, AND TO MODIFY THE SENTENCE AND JUDGMENT SO THAT THE IMPRISONMENT BE REMITTED LEAVING THE FINE STANDING; AND ALSO, IN VIEW OF THE FACT THAT PAUL OESTING, UPON THE EVIDENCE SHOWS WAS THE ACTIVE MANAGER AND IN CONTROL, PLEADED GUILTY OF THE CRIME CHARGED AGAINST DR. FREEMAN, AND HIS CASE ON APPEAL WAS AFFIRMED IN 234 FEDERAL 304.

We respectfully request the Court, in the event that the Court should disagree with our views that



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No. 2734

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

GIDEON M. FREEMAN,  
*Plaintiff in Error,*

VS.

THE UNITED STATES OF  
AMERICA,  
*Defendant in Error.*

## BRIEF OF DEFENDANT IN ERROR

JOHN W. PRESTON,  
United States Attorney,

ANNETTE ABBOTT ADAMS,  
Asst. United States Attorney,  
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Filed this.....day of May, 1917.

FRANK D. MONCKTON, Clerk,

**Filed**

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GIDEON M. FREEMAN,	}
<i>Plaintiff in Error,</i>	
vs.	
THE UNITED STATES OF AMERICA,	
<i>Defendant in Error.</i>	

**BRIEF FOR DEFENDANT IN ERROR.**

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I.

The indictment in the above-entitled case, which is identical with that filed in *United States vs. Oesting*, was held by this honorable court to be legally sufficient. See *Oesting vs. U. S.* 234 Fed., 304.

II.

That the letters set out in the indictment, the mailing of which is charged therein to be in violation of section 215 of the Criminal Code of the United States, were mailed in response to "decoy" letters sent out by Post Office Inspectors, is no defense to the charge set forth in the indictment.



This has been passed upon by the Supreme Court of the United States, and the language of Mr. Justice Brewer, in *Grimm vs. U. S.*, 156 U. S. 604, 311; 39 Law. Ed. 550, is peculiarly applicable to this case. He said:

“It does not appear that it was the purpose of the Post Office inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business. The mere facts that the letters were written under an assumed name, and that he was a government official—a detective he may be called—do not of themselves constitute a defense to a crime actually committed. The official, suspecting the defendant was engaged in a business offensive to good morals, sought information directly from him, and the defendant, responding thereto, violated a law of the United States by using the mails to convey such information, and he cannot plead in defense that he would not have violated the law if the inquiry had not been made of him by such government official.”

In *Goode v. U. S.*, 159 U. S., 663, 40 Law. Ed. 297, Mr. Justice Brown said:

“That the fact that the letter was a decoy is no defense is too well settled by the modern authorities to be now open to contention. (Citing authorities). Indeed, this Court held, in the last term, in *Grimm vs. U. S.*, that the fact that certain prohibited pictures and prints were drawn out of the defendant by a decoy letter written by a government detective was no de-

fense to an indictment for mailing such prohibited publications.”

Also see:

*Montgomery v. U. S.* 162 U. S., 410; 40 Law. Ed. 1020.

*Rosen v. U. S.* 161 U. S. 29; 40 Law. Ed. 606.

*Hall v. U. S.* 168 U. S. 632; 42 Law. Ed. 607.

### III.

It is not true as alleged by counsel for plaintiff in error, that there is no evidence in the record to prove that Dr. Freeman or any one else ever placed or caused to be placed or published in any newspapers or in any letters or booklets or other prints, advertisements of any kind or character whatever wherein it was set forth in substance or effect or at all any one or more of the things, pretenses, representations, promises or statements as charged in the indictment.

The indictment charges that defendant's scheme was (Tr. p. 3) that he should place or cause to be placed, advertisements in certain newspapers of general circulation published within the United States *or* in letters, booklets, or other prints, wherein it should be set forth in substance or effect that the said Dr. Jordan was a physician practicing in \* \* \* San Francisco \* \* \* and specially qualified to treat diseases of men, that is to say, among other diseases, syphilis, gonorrhea, and

diseases and affections arising therefrom, lost vitality, bladder, kidney, prostatic and urinary diseases, and had cured numerous persons afflicted with said diseases.

While it is our contention that evidence of such advertisements by either newspapers, letters, booklets, or prints would be sufficient to sustain the indictment, there is no lack of testimony that all of the methods of advertising were in fact used.

G. A. Leonard, called for the Government, testified (Tr. p. 6) that he had seen "Dr. Jordan's advertisement" such as were referred to in the letter signed "John Bammer", and such as were shown to him by counsel for the Government. James W. Woltz, also called for the Government, identified newspaper advertisements taken from the San Francisco Examiner of March 17th, 1912 (Tr. p. 106), and these same advertisements constituted a part of government's exhibit "C" for identification and were admitted in evidence as part of Government's Exhibit No. 3. The said advertisements both in substance and effect set forth the things, pretenses, representations, promises, and statements charged in the indictment. And, furthermore, it appears in the testimony of defendant Freeman himself (Tr. p. 267) that the concern was advertising and that he knew it.

That there was advertising of the kind alleged in letters, fully appears from the numerous letters and symptom blanks offered in evidence, many of which

were read into the record and appear in the transcript, the letter head used by defendant's concern appearing on page 62 thereof, and on page 267, where knowledge of its use was admitted by the defendant himself. And that they were advertising by means of booklets was fully shown by the introduction in evidence (Government's Ex. No. 5) of "The Philosophy of Marriage" referred to in the newspaper advertisements, in the correspondence (Tr. pp. 63, 72, 74, 93, 107) and admitted by Dr. Freeman to have been published and distributed by the Jordan Museum. (Tr. pp. 253-254, 259-260).

Counsel for plaintiff in error, on page seventeen of their brief, incorrectly assuming that there was a failure of proof as to the allegation of the indictment regarding advertising by means of newspapers of general circulation published within the United States, and arguing from this false premise, contend that such allegations being descriptive of the offense, cannot be rejected as surplusage; we challenge the truth of both premise and conclusion.

In *Hall v. U. S.*, 168 U. S. 633 (42 Law. Ed. 607) the Supreme Court held that an immaterial averment that a letter was intended to be delivered by a letter carrier, in an indictment which contained in addition all necessary allegations to charge an offense under the latter part of section 5467 Revised Statutes, need not be proved in order to sustain a conviction. The Court said:

"It is urged, however, that the conviction cannot be sustained under this third count be-

cause it contains, in addition to the particular allegations necessary to bring the act within the latter part of the section, an allegation that the letter, the contents of which were stolen, was intended to be delivered by a letter carrier. This fact forms no part of the offense mentioned in the second clause of the section in question, and it was therefore unnecessary to allege it. As the third count does contain such an averment, the counsel for the defendant argues that it became necessary to prove the fact thus averred, and, as it was (he argued) unproved, the defendant should have been acquitted by direction of the court. The result of such a holding would be to say that where an indictment contained all the necessary averments to constitute an offense created by the statute, if any averment wholly unnecessary and entirely immaterial be added, the prosecution must fail unless it prove such unnecessary averment, although proving every fact constituting the offense provided by the statute. We are of the opinion that it was not incumbent on the prosecution to prove this averment in order to sustain a conviction under this count.

Without this averment the third count contains every fact necessary to be proved in order to constitute an offense under the second clause of the statute, and the evidence in the case is sufficient to authorize the defendant's conviction upon that count. The character of the offense, as provided by statute, is not changed by this unnecessary averment, nor is the sufficiency of the evidence to sustain a conviction under the third count at all impaired if it be assumed that



it did not show that the letter was intended to be delivered by a letter carrier. This is unlike a case where an unnecessary amount of description of an article to be identified by the description is contained in the indictment. Under those circumstances it has been sometimes held that the description must be proved as laid, because it went to the identification of the article described. Nor is it like the case of an indictment for perjury or one for a libel where the sworn statement alleged to be false or the article alleged to be libelous must be proved substantially as averred in the indictment. In such cases the matter set forth constitutes the offense and must be proved accordingly. But here every necessary fact is averred and proof sufficient to sustain a conviction has been given in regard to each fact. Because the pleader unnecessarily made an averment of a totally immaterial fact, the government was not therefore bound to prove it in order to sustain a conviction. For this reason there was no fatal variance between the offense set forth in the indictment and the proof."

#### IV.

The testimony of the witness Walker was competent first, as showing a similar offense, and second, as showing the nature of the scheme to defraud.

The testimony of Walker shows that he carried on correspondence with Dr. L. J. Jordan through the mails for several months prior to visiting the place in San Francisco. He said: (Tr. p. 130) "I reside in San Jose, Santa Clara County, and have

resided there for about nine years. \* \* \* I have visited the place here in San Francisco known as Jordan's Museum. Prior to visiting that place, I had correspondence with the institution. \* \* \* (Tr. p. 131) I visited the place about eight months after the first correspondence; I doctored with them by *mail* up to that time, for about eight months. \* \* \* I commenced this treatment on the 6th of September, 1912, and quit doctoring there before the holidays of this year, 1914."

Letters received by Walker on the letter-heads of the institution were read in evidence and appear in the Transcript, pp. 134-143. (Government's Ex. No. 8). In the first of these, dated July 6, 1912, it was said: (Tr. p. 13) "I am *mailing* to you by this *mail*, my book 'The Philosophy of Marriage', *under separate cover*." And in the second, dated July 18th, 1912, "Some time since on your request I *mailed* you a copy of my book, 'The Philosophy of Marriage', which I trust you have received and read with care."

The record fails to show any objection to the introduction of the above correspondence on the ground that it was not carried on through the post office, and we submit that even if such objection had been made, ample evidence appears that the letters and the book were sent to Walker at San Jose, through the United States mails.

While it is true that Walker's testimony showed a kind of physical examination of Walker at Jor-

dan's Museum, this examination was not had until some eight months after the beginning of the correspondence, and Walker took medicine for about that period before he visited the place. (Tr. p. 132) The symptoms blank, and the form letters used in his case are identical with those used in the correspondence with Bammer (Tr. p. 63) Caroway, (Tr. p. 94) and Alberts, (Tr. p. 109). He paid his money for treatment before he ever visited the institution, received no benefit, and was told when he came in person, that he would have to take a "different treatment", (Tr. p. 132) and "more expensive medicines" and pay "an extra \$100 for treatment." (Tr. p. 133). Twice when he went to the Jordan Museum, he asked for Dr. Jordan and was told to wait a few minutes and he would be in. (Tr. p. 133) Walker paid them from \$200 to \$280 (Tr. p. 132) for the treatments, and while it may be true, as said by counsel on page 26 of their brief, "that he was actually ill and suffering from his ailments", it does not appear that he was suffering from what they were treating him for, and his testimony as a whole negatives counsel's contention, that the treatment was given in good faith.

Where the question of fraud is involved a large latitude is always given in receiving the facts, and that proof of similar fraudulent acts is generally relevant to show the intent and motive to defraud need not be urged upon this court. And as was said in *Moore vs. U. S.*, 150 U. S. 57; 37 Law. Ed. 996:

“Where the question relates to the tendency of certain testimony to throw light upon a particular fact, or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, unless it manifestly appear that the testimony has no legitimate bearing upon the question at issue, and is calculated to prejudice the accused in the minds of the jurors.”

And in *Wood v. U. S.* 16 Pet. 342. (10 Law. Ed. 987):

“ \* \* \* The next point presented for consideration is, whether there was an error in the admission of the evidence of fraud deducible from the other invoices offered in the case. We are of the opinion that there was none. The question was one of fraudulent intent or not; and upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate, or establish his intent, or motive in the particular act, directly in judgment.”

Also see:

*Thomas v. U. S.* 156 Fed. 897;

*Farmer v. U. S.* 223 Fed. 903;

*U. S. v. Snyder*, 14 Fed. 554.

In *Brooks v. U. S.* 146 Fed. 223, 231, it was held that the admission in evidence of certain letters

other than those counted on in the indictment, purporting to have been written by the Securities company to different persons throughout the country, and relating to transactions of the company with them, was proper. The court said:

“These letters were written about the time the offenses laid in the indictment were charged to have been committed. The issue was raised concerning the character of defendant’s business and the intent with which it was conducted. It was alleged to have been carried on with intent to defraud. The letters in question were admissible as bearing on the intent with which the business was done and the existence of the scheme to defraud as charged.”

And that the period of time within which collateral transactions offered to show guilty intent must have occurred, is largely discretionary with the court, is held in

*Spurr v. U. S.* 87 Fed. 701.

## V.

The testimony of witness Boerner was competent to show the course of business dealings carried on by the Jordan Museum during the period of his employment there, from May 1909 to October 1910, on the theory that habits and customs once shown to exist are presumed to continue.

*Wharton Criminal Evidence*, sec. 819;

16 Cyc. 1052;

*Lazarus v. Phelps*, 156 U. S. 202; (39 Law. Ed. 397);

*Greenleaf on Evidence*, Vol. I, Sec. 41, p. 138.



This presumption of continuance of facts once shown to exist is applicable to the course of business dealings between persons.

*Hastings v. Brooklyn Life Ins. Co.* 138 N. Y., 473; 34 N. E. 289.

## VI.

The motions of defendants at the close of Government's case, to strike out all the evidence, and to take the case from the jury, were properly denied. Furthermore, these motions were not thereafter renewed, and by introducing testimony in his own behalf, defendant waived his objections.

*Goldman v. U. S.* 220 Fed. 57

*Collins v. U. S.* 219 Fed. 670

*Sandals v. U. S.* 213 Fed. 573

*Gould v. U. S.* 209 Fed. 730.

In the latter case the court said:

“It is assigned as error that the evidence was not sufficient to justify the verdict. While this assignment is argued by counsel for both sides, there was no ruling by the trial court upon which such assignment could be based. A motion was made by counsel for defendants at the close of the evidence for the prosecution, for a directed verdict, but it was not renewed at the close of all the evidence, and was therefore waived.”

And while in the absence of a motion or request for an instructed verdict after all the evidence has been submitted, an appellate court *may* note a plain error such as the entire absence of evidence, yet it will not pass upon the weight and sufficiency thereof;

*Wiborg v. U. S.* 163 U. S. 632 (41 Law. Ed. 289).

And in *Simpson v. U. S.* 184 Fed. 817, 820, the Circuit Court of Appeals for the Eighth Circuit refused to review the sufficiency of the evidence because no request for an instructed verdict was made after all the evidence had been introduced.

We submit that there was no such lack of evidence as would constitute the judgment in this case plainly erroneous.

That the scheme charged in the indictment was devised, and that it was fraudulent, was amply proven, and the jury were justified in inferring guilty knowledge of and participation therein, of defendant, from his long connection (sixteen years) with the institution (Tr. p. 25); the fact that he was a director (Tr. p. 149) and secretary of the corporation, (Tr. p. 174); his frequent visits at the place, (Tr. p. 148); that the license was issued in his name (Tr. p. 150); that he signed checks (Tr. p. 150) in the name "L. J. Jordan" (Tr. p. 167, 189), and that he signed the minute book of the corporation (Tr. p. 171); that he owned 49,900

shares of stock, (Tr. p. 175), and received one-half the profits (Tr. p. 155); that the stock letters were easy of access (Tr. p. 157) and that they were in use for many years; that defendant had access to the books (Tr. p. 157); that he signed the by-laws, (Tr. p. 180); that he signed the certificate required by the State Board of Medical Examiners, (Tr. p. 188); that a large percentage, perhaps 30% of the business, was mail order business, and the letters sent out usually form letters (Tr. p. 191); the admissions of defendant that he had the book, "The Philosophy of Marriage" reprinted (Tr. p. 254); that he had heard of the form letters (Tr. p. 255), that business was carried on by mail, (Tr. p. 255), that he had seen the letter heads used (Tr. p. 266) and knew that the people working there were busy sending out mail, and that the firm was advertising (Tr. p. 266); and also his statements to the Police Commission, admitted to the State Board of Medical Examiners, that if a patient called asking for Dr. Jordan he would be told, "I am the doctor." (Tr. p. 233.)

## VIII.

The penalty imposed by the Court was a fair one, and the demands of justice do not call for a mitigation of same. If Dr. Freeman was guilty at all, and we do not doubt it, he was for many years a participant in the unlawful scheme, and he profited largely thereby, his profits sometimes amounting to as much as \$1,000 per month (Tr. p. 155). The sentence of imprisonment—one year in the county

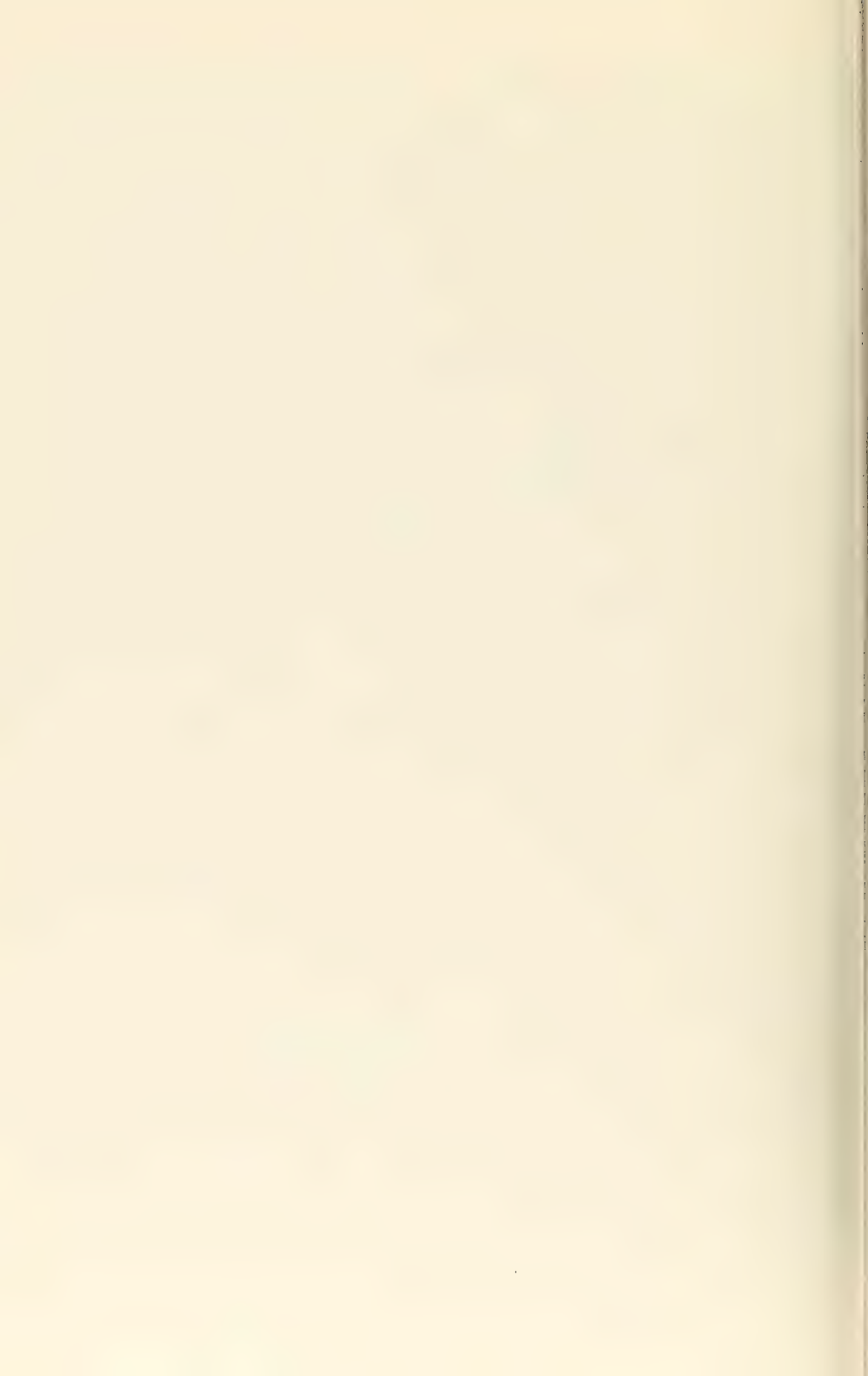
jail—is the same as that imposed upon Oesting, and though the fine imposed upon Freeman was \$1,000, while that of Oesting was \$500, the testimony shows that Freeman benefitted financially more than did Oesting.

The United States Attorney does not feel justified in consenting to a modification of the sentence imposed by the trial court, and submits that the judgment should be affirmed.

JOHN W. PRESTON,  
United States Attorney,

ANNETTE ABBOTT ADAMS,  
Asst. U. S. Attorney.

*Attorneys for Defenlant in Error.*





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No. 2734

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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GIDEON M. FREEMAN,

*Plaintiff in Error.*

VS.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

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REPLY BRIEF FOR PLAINTIFF IN ERROR.

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Filed this.....day of June, 1917.

**Filed**

JUN 7 - 1917

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.  
**F. D. Monckton,**  
Clerk.



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# United States Circuit Court of Appeals

For the Ninth Circuit.

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GIDEON M. FREEMAN,

*Plaintiff in Error,*

VS.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

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## REPLY BRIEF FOR PLAINTIFF IN ERROR.

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### I.

The plaintiff in error does not question the sufficiency of the *indictment*, but does insistently maintain that the *case and crime* charged in the indictment was *not proved* upon the trial; in truth, only a disjointed skeleton of the crime charged in the indictment was sketched by the proof on the trial.

For instance, the scheme or artifice to defraud or obtain money by false pretenses, etc., to be effected by means of the postoffice, which the indictment charges; the manner of effecting such scheme or artifice by placing or causing to be placed *advertisements* in certain newspapers of general circulation, etc., or placing or causing to be placed in

letters, booklets or other prints, *advertisements* that Dr. Jordan was a practicing physician specially qualified to treat certain specified private diseases and had cured many persons of the same, with intention to defraud them; to cause certain *five named* persons to communicate and correspond by mail, and then by letters, etc., through the postoffice defraud these persons; to make them believe they had disease when they had not; to furnish treatment and medicines regardless of symptom, disease or cure, and without value, etc., to cure; and that Dr. Freeman had no proper or professional knowledge of their condition, or whether diseased or not, or whether the medicine or treatment was capable of benefiting said persons; and for purpose of executing such fraudulent scheme, placed the letters in the postoffice addressed to these five persons, which letters are set out in the indictment (Tr. 2-31).

The proof in the case, we respectfully submit, wholly fails to fairly establish any of the essential facts and acts charged in the indictment; not only of the commission of any crime at all as a result of the things and matters as to which evidence was produced, but utterly failing to connect Dr. Freeman with the commission of the matters and things offered in evidence by the Government as constituting a criminal use of the postoffice with intent to defraud.

*First.* The indictment charges the scheme to defraud was to be effected *by advertisements* in newspapers, in letters, etc., setting forth in sub-

stance or effect that Dr. Jordan was qualified to treat the private diseases stated and had cured numerous persons afflicted therewith, and by these means the persons to be defrauded were to be induced to correspond, etc. (Tr. 3-4).

The learned United States attorneys (Brief, 3-4), assert that evidence of advertisements *by* either newspapers, letters, booklets or prints would be sufficient; that there is no lack of testimony that *all* of the methods of advertising were used.

The indictment says:

“said Dr. Gideon M. Freeman should place or cause to be placed advertisements *in* certain newspapers of general circulation published within the United States, or *in* letters, booklets or other prints, *wherein it should be set forth* in substance, or effect, *that*” etc. (Tr. 3.).

The learned Government attorneys then refer to certain *references* to testimony of Government witnesses, saying they saw advertisements, or to references on the trial that advertisements were in certain exhibits, in an attempt to support their claim that the advertisements charged in the indictment were proved as charged, or equivalent thereto.

Their *first* reference is to Inspector G. A. Leonard (Tr. 617), where it is stated in a letter written by Leonard to which he signed the fictitious name, “John Bammer”, that “I have seen your advertisement”, and follows this with his statement: “I have seen some of Dr. Jordan’s advertisements of *that kind*”.



But there is no proof here or by these vague references of the advertisements charged in the indictment; or in fact of any advertisement, that is, of the *contents* of any advertisement.

The *next* reference is to (Tr. 106) the testimony of James W. Waltz, a Government postoffice inspector. That testimony reads: "What *purports* to be an advertisement—a newspaper slip—I got from the San Francisco 'Examiner' at my office" (Tr. 106-107). He then says, "I wrote the letter headed \* \* \* That is a true copy of it, as follows:" Then follows *his* letter in which he says: "Will you please send me your book Philosophy of Marriage, which I see in an advertisement of the San Francisco Examiner you will send free" (Tr. 107).

There is no evidence here of advertisements or contents thereof as charged in the indictment.

The learned Government attorneys say (Brief, p. 4): "these same advertisements constituted a *part* of Government's Exhibit 'C' for identification, and were admitted in evidence as part of Government's Exhibit No. 3". But the only evidence here (Tr. 106) is of that witness who says: "*I wrote* some of the *correspondence* in Government's Exhibit 'C' for identification" (Tr. 106).

Now, turning to page 55 of the transcript the court will find that the witness for the Government, F. D. Crable (Tr. 53) was shown a "*package* of correspondence you show me, purporting to be

letters sent and received through my office" (Tr. 54); this witness identified one letter, and this letter was marked for identification "Exhibit C" (Tr. 55) thus: "(Letter marked for identification Exhibit 'C')".

"Exhibit C" was a "(Package marked United States Exhibit No. 3)" (Tr. 92); it consisted of *letters* and they run through pages 92 to 131, and are *all letters*.

The United States attorney made formal offer of the file "Exhibit C" (Tr. 117); and the postoffice inspector, Edmond Honvery, then testifying, said: "This package purports to be a *file of test* correspondence, conducted by me under the name of Anson Ashford" etc. (Tr. 118).

Therefore, the learned Government attorneys are mistaken in the statements in their brief, pages 3-5, that there was proof made upon the trial of the advertisements, that is, of statements *set forth in advertisements* as charged in the indictment. There is no such proof in the record.

The learned Government attorneys (Brief, p. 4), say that on page 267 of this record that Dr. Freeman testified "that the concern was advertising and that he knew it". This is incorrect—Dr. Freeman was testifying to the *letterheads* of "Jordan's Museum of Anatomy", and not to the advertisements charged in the indictment. Nor is this statement correct of the other references to the transcript, pages 62, 63, 72, 74, 93 and 107, and tran-

script pages 253-254, 259-260; these all refer to a book called the "Philosophy of Marriage", and there is no evidence that this book contained advertisements of the matters and things charged in the indictment.

*Second.* The charges in the indictment that Dr. Freeman tried to make persons believe they were afflicted with diseases when they were not, and *gave or sent* medicines, of little or no value, for the cure of persons afflicted, and to defraud them, and that Dr. Freeman had *no proper or professional knowledge* of such persons' condition, or whether they were diseased or not or whether or not said purported treatment or medicine was capable of benefiting said persons (Tr. 5).

Dr. Freeman was educated at Lake Forest College, in North Carolina; was a soldier in the Civil War; graduated in medicine in 1873, and practiced over *thirty* years (Tr. 250); and was in *good standing* in every way as a physician and surgeon (Tr. 187-188) all his life.

*Third.* There was and is no proof in the record of any scheme or artifice *to defraud* any person; and the five persons here named in this indictment were *all fictitious*, as well as the correspondence *initiated* by the Government inspectors as *test* correspondence; and every act charged in the indictment of which there was any proof at all on the trial, that proof made by the Government itself, shows absolutely that the Government postoffice inspectors initiated, solicited and induced through

*test* correspondence, with intent and purpose that no crime in fact should be or would be committed, every act and thing done and proved by them, but with intent to secure and prosecute this indictment, in the event that the Government inspectors' *test* correspondence should be answered as they requested it should, *through the postoffice*.

*Fourth.* The entire proof absolutely fails to establish the commission of a violation of Section 215, Criminal Code, through the doing by any person of the various acts and things shown upon the trial of this case.

The principal charge seems to be based upon the request for a sample of *urine*, and the reply as to what it indicated; and the postoffice inspector's testimony that he tried to make the sample *urine* (Tr. 129-130).

*Dr. Tait*, for the Government, seems to be their foundation for such a claim (Tr. 204-205), and he practically eulogizes "masturbation" (Tr. 206-207).

*Dr. McNutt*, for the Government, does not hold such conclusions (Tr. 196-200); he says:

"If a man patient were to send me a bottle of liquid that *looked* like urine, without testing it to find out whether it was or not, *I would assume that it was*" (Tr. 199).

*Dr. L. F. Kebler*, the Government witness and expert from the Bureau of Chemistry, Washington, D. C., agreed with *Dr. McNutt* that

“If I were a physician and prescribing for a patient and the patient sent me what *he* claimed was a sample of his *urine*, *I would assume it was urine* \* \* \*” (Tr. 234).

This same learned witness *for the Government* testified:

“I have read the various symptoms of these supposed patients here. I have heard all the testimony in the case. I agree with the opinion of Dr. Tait and Dr. McNutt that *sufficient* information is not disclosed here to tell *what* is the matter with these people, *or whether there is anything* the matter” (Tr. 231).

The Government’s inspector testified that he received one letter after sending a sample of *urine* telling him the sample was very poor quality, about same as ordinary water, and asking for another sample (Tr. 96, 100), and they sent additional samples (Tr. 96-97).

There is no proof in the record that anything shown by or appearing from the evidence on the trial was fraudulent, or done as the result of any scheme or artifice to defraud any person; and the evidence does not prove or establish that any scheme or artifice to defraud or obtain money or property by false pretences or promises, by means of the postoffice, was ever devised by Dr. Freeman or any one else, or that any attempt or use of the postoffice was ever made to effect or carry out any such scheme to defraud.



## II.

The learned Government attorneys assert that the letters set out in the indictment were mailed in response to "*decoy*" letters sent out by the postoffice inspectors, and that fact is no defense (Brief, p. 1).

And they then quote from *Grimm v. U. S.*, 156 U. S. 604; but that case was under Section 3893, R. S., which made *lewd* pictures, etc., and every letter, etc., giving information as to such, *unmailable*, and penalizing any person who knowingly deposited any such for mailing.

Justice Brewer said:

"so, here, the *gist* of the offense is the *mailing* of a letter giving information" (p. 609).

And, again:

"The law was actually violated by the defendant; he placed letters in the postoffice which conveyed information as to where obscene matter could be obtained, and he placed them there with a view of giving such information to the person who should actually receive those letters, no matter what his name; and the fact that the person who wrote under these assumed names and received his letters was a government detective in no manner detracts from his guilt" (p. 611).

They quote, also, *Goode v. U. S.*, 159 U. S. 663, a case of embezzlement or *theft* by a letter carrier from the mails of a *decoy* letter containing money, and the Court held that the letter carrier had no more right to appropriate the letter to himself than

he would if it were a genuine letter (p. 671). Their other citations are similar.

In the case at bar, the charge is, *not* of depositing these letters in the mails, etc., but of *using* the mails for the purpose of executing or attempting to execute *a scheme or artifice to defraud*.

The learned trial judge thus epitomized the statute under which this charge is made, viz:

“ ‘Whoever, having devised or intending to devise any scheme or artifice *to defraud*, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, shall, *for the purpose of executing* such scheme or artifice, or attempting so to do, place, or cause to be placed, any letter, in any postoffice of the United States, to be sent or delivered by the postoffice establishment of the United States, or shall take or receive any such therefrom, shall be’ punished as therein provided. To constitute an offense under the section you will observe that *two elements are essential*:

1. The devising by the defendant of a scheme or artifice *to defraud*; and
2. The use of the United States mails, as set out in that section, *for the purpose of executing* or attempting to execute such scheme or artifice” (Tr. 275).

There is no comparison between any of the cases cited and the case at bar. Here, the *use* of the mails is not prohibited, but use of the mails *with intent* to defraud or obtain money by false pretenses is prohibited.

In the recent case of Sam Yick v. United States, 240 Fed. 60, decided by this Court, the Government

attorneys cited and quoted the decision of Judge Brewer in the case of Grimm v. U. S., 156 U. S. 604, urging upon *this* Court that there the Government inspectors were but “*decoys*” and had not initiated the crime and then secured the indictment of the defendant therefor.

This Court in deciding the case of Sam Yick v. U. S., 240 Fed. 60, at page 65, said:

“And while it may be true that the mere aiding of one in the commission of a criminal act by a Government officer or agent does not preclude the conviction of the party committing the crime, yet where the officers of the law have *incited* the party *to commit* the crime charged and *lured* him on to its consummation, the law will *not* authorize a verdict of guilty.”

And on page 67 this Court, concluding its opinion, said:

“In the recent case of Woo Wai v. United States, 223 Fed. 412, 137 C. C. A. 604, we distinctly adjudged that it is against public policy to sustain a conviction for crime where the party or parties are induced to commit it by officers of the Government who thereafter ensnare and apprehend them in such commission. In addition to the authorities there cited in support of that conclusion, see, also, Taylor v. United States, 193 Fed. 968, 113 C. C. A. 543, decided by this Court prior to the decision in Woo Wai v. United States, *supra*; United States v. Healy (D. C.) 202 Fed. 349; United States v. Jones (C. C.) 80 Fed. 513; United States v. Adams (D. C.) 59 Fed. 674; United States v. Whittier, Fed. Cas. No. 16,688, 28 Fed. Cas. 594.”

The Government inspector, Honvery, in the case at bar, testified:

“Upon the *initiative* of the chief inspector this investigation was *begun* \* \* \* by me \* \* \*. *The first act done* \* \* \* *by me* is this \* \* \* letter (Tr. 118). \* \* \* *In response* to that, *the first letter received* from Dr. Jordan *came* \* \* \* (Tr. 119). *Then I filled out* the symptom blank and sent it for mailing” (Tr. 119).

We submit that the Government inspectors themselves all testify that *they initiated* the correspondence in this case; and *in response* to their initiation the acts charged are by them asserted to have been done.

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### III.

The learned Government attorneys say, on page 13 of their brief:

“We submit that there was *no such lack of evidence* as would constitute the judgment in this case *plainly erroneous*” (italics ours);

thus, we take it, showing their conscientious belief that the *guilt* of Dr. Freeman was *not* amply proven, as they insist was the case of the scheme charged in the indictment.

From no evidence in the record can it be fairly maintained that Dr. Freeman ever devised a scheme or artifice to defraud or did any other of the acts or things charged against him in the indictment;

and the evidence does not prove or establish that the carrying on and conduct of the business of the Dr. L. J. Jordan Company and Jordan's Museum of Anatomy was fraudulent, or that soliciting patients, advising and treating them as disclosed by the evidence, was or constituted a fraudulent scheme or artifice to defraud such persons or to obtain from them money or property by false pretences and promises, as charged in the indictment in this case.

And, as we pointed out in our opening brief, pages 38 to 43, all of the Government's witnesses eliminated Dr. Freeman from any intention on their part that their testimony should be taken or understood to charge or connect Dr. Freeman with anything whatever that was improper, as to which they might have testified.

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#### IV.

The other questions discussed by the learned attorneys for the Government have been fully considered and presented by us in our opening brief for the plaintiff in error.

In conclusion, we respectfully submit that the judgment should be reversed; and in the event that the Court should not reverse this judgment, then we respectfully appeal to the Court to modify



the judgment, so that the sentence of imprisonment may be remitted.

Dated, San Francisco,

June 1, 1917.

KNIGHT & HEGGERTY,

CHARLES J. HEGGERTY,

*Attorneys for Plaintiff in Error.*

No. 2734

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GIDEON M. FREEMAN,

*Plaintiff in Error,*

VS.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

PETITION OF PLAINTIFF IN ERROR FOR  
A REHEARING.

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Filed

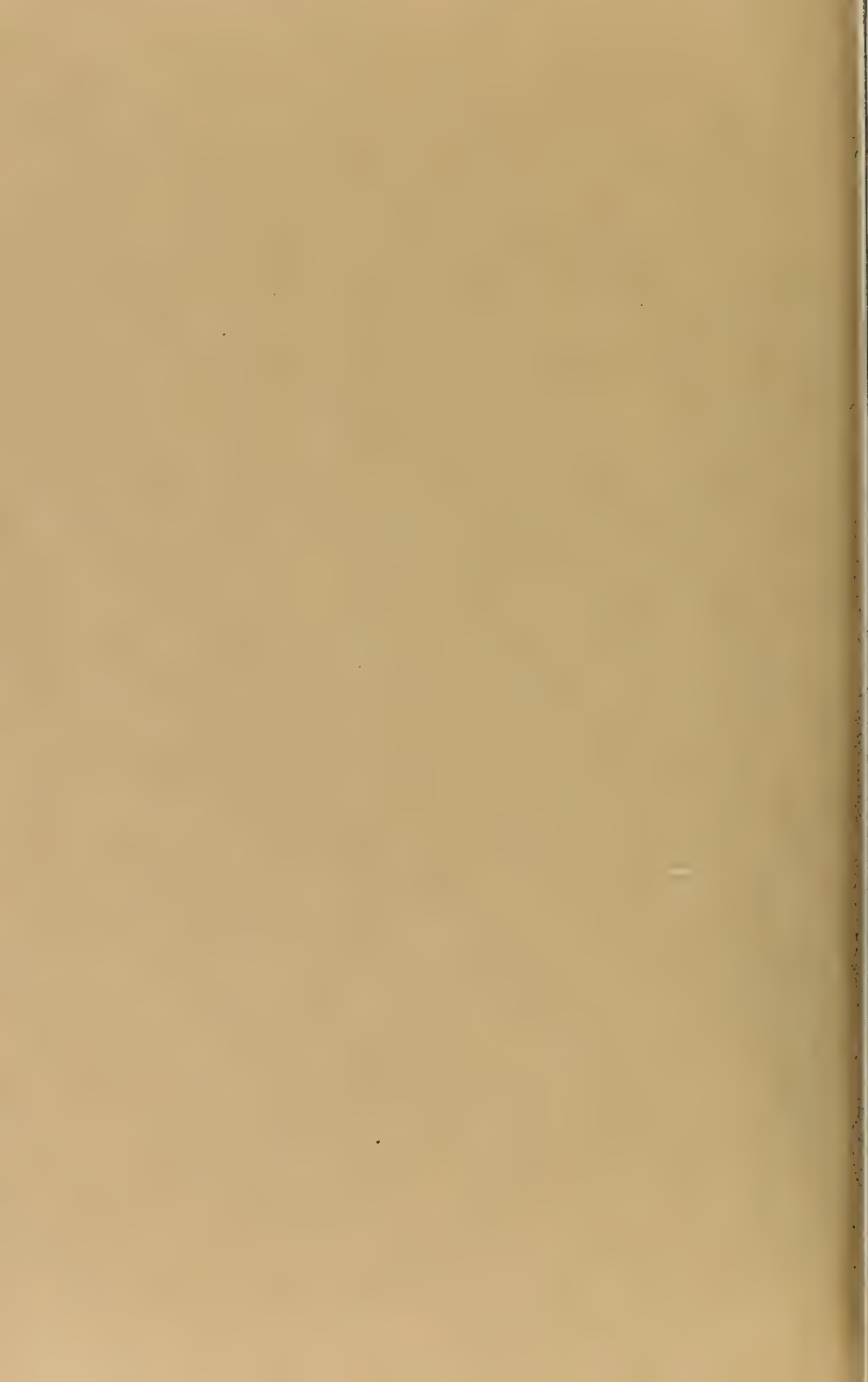
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Filed this.....day of August, 1917.

F. D. Monckton

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.



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## PETITION OF PLAINTIFF IN ERROR FOR A REHEARING.

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*To the Honorable William B. Gilbert, Presiding  
Judge, and the Associate Judges of the United  
States Circuit Court of Appeals for the Ninth  
Circuit:*

### The Case.

April 20, 1915, an indictment was presented under Section 215 of the Criminal Code, against Gideon M. Freeman, in *five* counts, charging in the *first* count, that Dr. Gideon M. Freeman, alias Paul Allen, doing business at 986 Market Street, San Francisco, under the name of Dr. Jordan, L. J. Jordan Co. and Jordan Museum of Anatomy, a corporation organized under the laws of California,

on or about May 15, 1912, under the guise and name of said Jordan's Museum of Anatomy, *devised a certain scheme or artifice to defraud, or for obtaining money or property by means of certain false pretenses, representations or promise to be effected by means of the postoffice* establishment of the United States, as follows:

That Dr. Gideon M. Freeman, alias Allen, *should place or cause to be placed advertisements in newspapers of general circulation published in the United States, or in letters, booklets or other prints, setting forth in substance or effect that said Dr. Jordan was a physician practicing in San Francisco, and specially qualified to treat private diseases of men, among other diseases, syphilis, gonorrhea and diseases and affections arising therefrom, lost vitality; bladder, kidney, prostate and urinary diseases, and had cured numerous persons afflicted with said diseases, and by means of said advertisements, letters, booklets and other prints he, said Dr. Gideon M. Freeman, alias Paul Allen, then and there intended to cause or induce John Bammer, J. P. Millspaugh, George R. Alberts, Anson Ashford and John Caroway, and divers other persons whose names are unknown, and the public generally, to communicate and open correspondence with Dr. Jordan by means of the postoffice, relative to their real or supposed ailments; that when said persons should communicate with him, Dr. Jordan, whom the defendant knew was not a doctor or person existing in life, by the means aforesaid, that said*



Dr. Jordan should write or communicate with such persons by means of letters placed in the postoffice, in substance and effect stating, with intent to defraud such persons irrespective of symptoms, and even where they indicated health rather than disease, etc.

That said Dr. Gideon M. Freeman on July 2, 1912, at San Francisco, for the purpose of executing said scheme or artifice, or in attempting so to do, unlawfully, feloniously, knowingly and willfully, placed or caused to be placed in the postoffice, to be delivered thereby, a certain letter upon which postage had been prepaid, addressed to John Bammer, Colusa, California, a copy of said letter being as follows, to wit, (setting out the letter) (Tr. 5-8).

The other *four* counts are identical with the *first*, except that the *letter* set out is different, the date of mailing is different, and the person to whom the letter was mailed is different; in the *first* count the letter was mailed to *John Bammer*, in the *second* count to *J. P. Millspaugh*, in the *third* count to *George R. Alberts*, in the *fourth* count to *Anson Ashford*, and in the *fifth* count to *John Caroway* (Tr. 6-29).

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### Reasons for Rehearing.

The plaintiff in error respectfully prays the Court to grant him a *rehearing* of the above-entitled cause, upon the following grounds:

*First.* That there was absolutely no proof of the *scheme* or the material element of the scheme to defraud charged in the indictment, in this: that the indictment expressly charges the material element of the scheme to defraud to be that plaintiff in error

“should place or cause to be placed *advertisements* in certain newspapers of general circulation published within the United States, or in letters, booklets or other prints, wherein it should be set forth \* \* \* *and by means of said advertisements* \* \* \* he then and there intended to cause or induce (the five fictitious persons) \* \* \* to communicate and open correspondence with Dr. Jordan, by means of the postoffice; that *when* said persons should communicate with him, Dr. Jordan, \* \* \* that *he*, the said Dr. Gideon M. Freeman \* \* \* should write or communicate with said persons by means of letters placed in the postoffice” (Tr. 3-4).

There is *no proof* in the record that the plaintiff in error “placed or caused to be placed” *advertisements* in any newspapers, or in letters, booklets or other prints, as alleged in the indictment, wherein were set forth the things alleged in the indictment.

This Court in its consideration of the case on the writ of error *overlooked this point* made in his brief by plaintiff in error, and omitted to make any ruling thereon.

In the case of *Goldman v. U. S.*, 220 Federal 57, 59-62, cited by the Court, in its opinion, the scheme to defraud was by an advertisement in the Cleveland Tribune, and asked for replies *by letter* through the

postoffice, and Goldman took these letters from the postoffice.

Unless the scheme to defraud which the indictment charges against the defendant has been proved, it is our belief that this Court would not feel justified in sustaining the conviction.

The bill of exceptions "contains *all* of the evidence of any and every character given, and all proceedings had upon the entire trial of this case" (Tr. 283).

The plaintiff in error should be granted the opportunity to present and have this essential point in his case considered and decided by the Court.

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*Second.* The United States Inspectors initiated and solicited the letters set forth in the indictment, and the deposit in the postoffice of *these letters* so solicited and initiated constitute the crime charged in the indictment; and when *the only acts* done by the plaintiff in error are charged to constitute the crime for which he was convicted and sentenced, and that in the doing of these acts so solicited and initiated it is charged that the offense had its origin in his mind, and the Government Inspectors *suggested to him the doing of these acts by him*, then, we respectfully submit, *the offense* had its origin in the minds of the Government Inspectors, and exactly as lucidly stated by Judge Gilbert in *Woo Wai v. U. S.* 223 Fed. 414, 415:

“Woo Wai and his associates, therefore, *although they were not aware of the fact*, were engaged in an act *which was not to result* in an accomplished offense against the laws of the United States.”

So, in this case, paraphrasing the decision in the Woo Wai case:

“Dr Freeman, in depositing these letters in the postoffice, although he was not aware of the fact, was engaged in an act which was not to result in an accomplished offense against the United States.”

And why, when these letters were deposited in the postoffice, was Dr. Freeman engaged in an act which was not to result in an accomplished offense against the United States? Because the Government Inspectors were conducting a test correspondence, under the names of fictitious persons, to ascertain whether the plaintiff in error, who was suspected by the Government of being engaged in a scheme to defraud, was engaged in such a scheme or not.

It is not only admitted, but proved by the Government, that the *five letters* set forth in the indictment, for the alleged *depositing* of which *in the postoffice* the plaintiff in error is charged with a violation of Section 215 of the Criminal Code, were initiated, requested and solicited to be by him *deposited* in the postoffice, by the Government Inspectors; and if the deposit of these letters, so solicited, etc., be an offense, conclusively then, *that*

*offense had its origin*, not in his mind, but in the minds of the Government Inspectors.

The case is, we respectfully submit, identically the same as, and should be ruled by the decisions of this Court in the cases of *Woo Wai v. U. S.*, 223 Fed. 414, and *Sam Yick v. U. S.*, 240 U. S. 60.

The case of *Grimm v. U. S.*, 156 U. S. 604, was upon a statute of the United States which made criminal the *mere deposit* in the postoffice of *letters* giving information of a certain kind.

In the case of *Goldman v. U. S.*, 220 Fed. 57, on page 62, the Court said that the writer of *one* of the letters was *not* in the employ of the Government.

We respectfully submit, that as the acts charged in this indictment to have been done by Dr. Freeman, were initiated and solicited by the Government Inspectors, and not only would not but could not have been done by Dr. Freeman had not the Government Inspectors initiated and solicited the doing of the acts charged in the indictment, that the writing and mailing of these letters set forth in the indictment did not and could not constitute an offense against the United States; and that every possible element that must exist in order to constitute the crime charged in the indictment is absent from the proof in this case.

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*Third.* In concluding our brief we made the point, which has escaped the attention of the Court,



because it was involved with our request for remission of the jail sentence, that this Court should take *judicial notice* that Dr. Freeman, the plaintiff in error, did not commit the crime charged. Paul Oesting was indicted for *the* offense of depositing *these identical letters* in the postoffice, in an indictment literally the same as that in this case, substituting his name in place of Dr. Freeman's name; he pleaded guilty, was sentenced, sued out a writ of error from this Court, and this Court *affirmed* that sentence in *Oesting v. United States*, 234 Fed. 304. The transcript in this Court is No. 2712 (brief of plaintiff in error, p. 44).

We therefore submit that the records of this Court establish that Paul Oesting, and not Dr. Freeman, deposited these letters in the postoffice; and that the plaintiff in error is not, therefore, guilty of the crime charged against him.

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We respectfully pray the Court to grant the plaintiff in error a rehearing in the above-entitled cause.

Dated, San Francisco,  
August 15, 1917.

KNIGHT & HEGGERTY,  
CHARLES J. HEGGERTY,  
*Attorneys for Plaintiff in Error  
and Petitioner.*

## CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for plaintiff in error and petitioner in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

CHARLES J. HEGGERTY,  
*Of Counsel for Plaintiff in Error  
and Petitioner.*

